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## Why and How Businesses Use Planned Early Dispute Resolution

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## ARTICLE

# WHY AND HOW BUSINESSES USE PLANNED EARLY DISPUTE RESOLUTION

JOHN LANDE AND PETER W. BENNER\*

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## I. INTRODUCTION

Think different. Apple Computers' iconic advertising slogan<sup>1</sup> could be the motto for all innovators. With the benefit of hindsight, spectacular innovations seem obvious and even inevitable. But when such innovations were being developed, most people probably accepted the status quo and were skeptical about the value of something different. Indeed, some innovations fail to provide the promised benefits or never achieve broad acceptance, so people's reluctance to adopt the new or unproven is not surprising. People resist change for many reasons, including habit, inertia, caution, self-interest, reluctance to incur the costs of change, and conformity to cultural norms, among others. Yet some people do "think different" and adopt innovations well before they become mainstream.

This article reports the results of an empirical inquiry analyzing why some businesses do think and act differently by adopting "planned early dispute resolution" (PEDR) systems when most other businesses probably do not do so.<sup>2</sup> PEDR is a general approach designed to enable parties and their lawyers to resolve disputes favorably and with reduced cost as early as reasonably possible. It involves strategic planning for preventing conflict and handling disputes in the early stages of conflict, rather than dealing with disputes ad hoc as they arise. There is no general understanding of what PEDR is since businesses use a variety of PEDR procedures, as described below.<sup>3</sup> Thus, it is impossible to estimate accurately the proportion of businesses that use a PEDR system. But our sense is that a relatively small proportion of businesses consistently and systematically uses PEDR processes.

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1. *Think Different*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Think\\_different](https://en.wikipedia.org/wiki/Think_different) (last visited Dec. 6, 2015).

2. See Peter W. Benner, *'Think Different' About Business Disputes*, CONN. L. TRIB., Sept. 6, 2013.

3. See *infra* Part III.

Some leading companies started using PEDR systems several decades ago.<sup>4</sup> For example, Motorola started its program in the 1980s, including use of dispute resolution contract clauses, early case assessment, systematic use of ADR, development of an ADR manual, and training of multiple stakeholders.<sup>5</sup> In 1995, the Georgia-Pacific Corporation initiated its early dispute resolution program, which included dispute resolution contract clauses, early case evaluation, a resource library, training, measurement of results, and designation of an inside counsel to be responsible for the program.<sup>6</sup> The General Electric Company began its early dispute resolution system in 1998, including an early case assessment program, an “early warning system,” guidance on selection of dispute resolution methods, training, and “after action reviews.”<sup>7</sup> Its system covers the entire duration of all cases, starting from dispute prevention through litigation and appeals.<sup>8</sup>

Some companies with PEDR systems have quantified significant cost savings that they achieved. For example, a DuPont Company study showed that “average potential litigation cost savings from use of early mediation in our matters were \$61,000 per employment litigation matter and \$76,000 per personal injury case. Savings in commercial matters averaged \$350,000.”<sup>9</sup> Georgia-Pacific estimated that it saved \$1 million to \$6.5 million per year in the period from 1995 through 2004.<sup>10</sup>

Several empirical studies describe patterns of use of PEDR systems. A study conducted in the mid-1990s analyzed six companies that were concerned about litigation costs. Five of the companies had signed pledges to use ADR in business disputes but used ADR only on an ad hoc basis and struggled to increase efficiency because of “contentious corporate cultures, the emotional investment of managers in disputes, misalignment of incentives for managers and outside lawyers, and what we might call the professional culture of lawyers.”<sup>11</sup> Only one of the companies in that study was successful in managing disputes in a way that reduced litigation costs. In that company, the legal division defined its mission “to maximize prompt

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4. See CATHERINE CRONIN-HARRIS, BUILDING ADR INTO THE CORPORATE LAW DEPARTMENT 57–67 (1997) (describing programs at twenty-three major corporations).

5. See generally Richard H. Weise, *The ADR Program at Motorola*, 5 NEGOT. J. 381 (1989); see *infra* Section IV.G (describing an early case assessment).

6. Phillip A. Armstrong, *Georgia-Pacific's ADR Program: A Critical Review After 10 Years*, 60 DISP. RESOL. J. 19, 20 (2005).

7. Elpidio “PD” Villarreal, Jeffrey D. Paquin & Jennifer Boyens Victor, *General Electric's Integrated Conflict-Management System: The Prevention, Early Identification and Early Resolution of Disputes*, CHIEF LEGAL OFFICER, Spring 2002, at 35.

8. *Id.*

9. David H. Burt, *The DuPont Company's Development of ADR Usage: From Theory to Practice*, DISP. RESOL. MAG., Spring 2014, at 5, 7–8.

10. Armstrong, *supra* note 6, at 2.

11. Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 5, 9 (1998).

and favorable settlements, and the indicators of success were the shortness of the duration of disputes, favorable outcomes, cost savings, and client satisfaction.”<sup>12</sup> The inside lawyers routinely conducted early case evaluations and then regularly negotiated and mediated cases. The legal division carefully controlled the amount of discovery and tracked the results of cases in terms of favorable settlements and reduction in disposition time. In addition to handling individual disputes, they analyzed the general patterns of disputing and worked to change counter-productive incentives and adversarial elements in the corporate culture. For example, they encouraged business people to negotiate by considering their counterparties’ interests as well as their own.<sup>13</sup>

In a 2007 study based on interviews with inside counsel in twenty-one global corporations, seven of the companies were categorized as “embedded users” of ADR because it played a central role in their dispute resolution culture.<sup>14</sup> As distinct from companies that managed disputes on an ad hoc basis or did not use ADR at all, these companies trained their inside counsel to manage disputes systematically by using early case assessment processes or informal guidelines. They used ADR, especially mediation, more often and earlier than other companies, and were more likely to produce data to evaluate the effectiveness of their ADR efforts. They believed that they saved litigation costs and management time, maintained greater control, used the process to manage relationships with their counterparties, and had constructive relationships with their outside counsel.<sup>15</sup>

In 1996, Catherine Cronin-Harris, then vice-president of the CPR Institute for Dispute Resolution, published *Mainstreaming: Systematizing Corporate Use of ADR*, in which she chronicled the use of ADR by numerous corporations and argued that businesses were at the “threshold” of a third phase of business disputing.<sup>16</sup> The three stages were “(1) the ad hoc stage, characterized by idiosyncratic ADR use; (2) the strategy deployment stage, characterized by establishment of tools to encourage ADR; and (3) the systems design stage, characterized by retooling of existing ADR strategies to integrate ADR use into the business and maximize its benefits.”<sup>17</sup> She said that the systems design phase emphasizes:

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12. *Id.* at 16.

13. *Id.* at 18–22.

14. *The Inside Track—How Blue-Chips are Using ADR*, HERBERT SMITH 1, 11–13 (Nov. 2007), <http://www.herbertsmithfreehills.com/-/media/HS/Insights/Guides/PDFs/Alternative%20dispute%20resolution%20-%20the%20inside%20track/1%206398ADRreportD4.pdf> (detailing that one-third of the companies in this study were considered as embedded users. Since the study was based on a small non-random sample, this is not necessarily a valid estimate of the proportion of companies that use PEDR systems).

15. *Id.*

16. Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 873 (1996).

17. *Id.* at 858.

(1) greater synthesis between the attorneys and business managers; (2) greater involvement of corporate dispute participants in prevention, as well as resolution, of disputes; (3) more effective ADR incentives with outside counsel and claimants; (4) fine tuning and earlier use of interest-based ADR procedures; and (5) industry-wide collaboration in ADR encouragement.<sup>18</sup>

By 2015, when we conducted this study, using a PEDR system should have been a “no-brainer” for businesses that regularly litigate, considering this history of innovation in systematic business dispute resolution. Litigation undermines many business interests such as efficiency, protection of reputations and relationships, control of disputes and general business operations, and risk management, among others. Indeed, considering the increasing economic pressures on businesses, the prospect of reducing litigation costs in itself should be a major reason why corporations would incorporate PEDR in their case management process. One might assume that because of these interests, most business leaders would direct their legal departments to implement PEDR systems. Moreover, to advance the companies’ interests and gain favor with the “C-Suite,”<sup>19</sup> one might expect general counsel to take the initiative to develop such systems and direct their staff and outside counsel to faithfully use a PEDR system. Inside counsel would readily comply because of the directives from their bosses and outside counsel would comply out of fear of losing business to competitor law firms. Although these all seem like plausible assumptions, this study indicates that they all are problematic. Indeed, despite strong interests in using some form of PEDR, many (perhaps most) businesses seem like proverbial lemmings, unable to change their litigation-as-usual (LAU) approach.

Nonetheless, some companies—and particularly their inside counsel—have been able to “think different” about systematically handling disputes, and they use PEDR systems to advance their business interests. We conducted in-depth interviews with inside counsel at major corporations that have adopted PEDR systems to understand why these businesses were able to adopt a PEDR system, unlike many of their competitors. This research strategy enabled us to get a deeper understanding of their perspectives than would be possible with standardized surveys.

We found that dispute system design (DSD) theory helps explain why companies do or do not use PEDR systems, and further suggests ways for companies to overcome barriers to adopting such systems. DSD involves assessing the current process of handling disputes, designing new processes,

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18. *Id.* at 873.

19. Several people interviewed for this study referred to the “C-Suite,” which is slang for top senior executives whose titles start with the letter “c,” such as chief executive officer, chief operating officer, and chief information officer. *C-Suite*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/c-suite.asp> (last visited Dec. 8, 2015).

implementing the design, and periodically evaluating and refining the dispute system.<sup>20</sup> In particular, it requires understanding the goals and perspectives of the affected stakeholders and their motivation to cooperate with or hinder system design processes.<sup>21</sup>

This study illustrates that key stakeholders have their own interests, which often are satisfied by continuing with the status quo of LAU rather than switching to a PEDR system. The C-Suite often does not want to “get into the weeds” of managing litigation. Inside counsel and middle-level employees may feel that they currently handle disputes effectively, and they may resent efforts to reduce their autonomy. Outside counsel may worry about interference with their professional responsibility to produce the best legal results and their ability to generate substantial revenue that generally flows from LAU. Although general counsel have the formal authority to direct inside and outside counsel to use PEDR processes, the general counsel may not do so for various reasons such as their temperament, background, training, or reading of internal business priorities. Even if they implement a PEDR system, the system is unlikely to be as effective as possible if key stakeholders resist.

More generally, what may seem irrational to outside observers may seem quite rational to individual stakeholders. Although the status quo may not seem optimal to some stakeholders, doing something different may seem risky, possibly subjecting them to criticism if things do not work out well.<sup>22</sup> Business people normally do not get involved in dispute resolution and they may not be interested in PEDR processes unless it “hits them personally.”<sup>23</sup> One lawyer said that the biggest barrier to adopting a PEDR system was simply agreeing to change. “People get set in their ways. Teaching an old dog new tricks is very tough. Change is upsetting the apple cart and people don’t want to hear it.”<sup>24</sup> So, although adopting a PEDR system may seem like a no-brainer at first blush, proponents of this approach often face significant barriers that make it difficult to adopt and sustain this innovation.

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20. See NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* 13–20 (2013); see also JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY* 326–33 (2015) (bibliography of publications about DSD).

21. Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 129–31 (2009).

22. Compare Telephone Interview with Anonymous Source II (Oct. 14, 2015) [hereinafter Interview II] (explaining that one lawyer said that using a potentially better process should be less of a career risk than having a bad decision in a case), with Telephone Interview with Anonymous Source V (Nov. 5, 2015) [hereinafter Interview V] (showing that some people do not think of it this way). See *infra* Part II (describing the methodology of this study).

23. Telephone Interview with Anonymous Source XII (Oct. 26, 2015) [hereinafter Interview XII].

24. Telephone Interview with Anonymous Source III (Oct. 21, 2015) [hereinafter Interview III].

This study demonstrates the importance of planning in early dispute resolution. Companies sometimes use dispute resolution methods such as mediation at an early stage of a dispute on an ad hoc basis.<sup>25</sup> This can be problematic for several reasons. *Unplanned* early dispute resolution efforts are less likely to be successful if the lawyers and parties have not prepared adequately, exchanged the necessary information, and have the proper mindset to resolve disputes.<sup>26</sup> When stakeholders have negative experiences with ad hoc early dispute resolution processes, they may be reluctant to try them again.<sup>27</sup> Such frustration could be reduced by taking initiative in handling matters as early as reasonably possible. This article demonstrates that arranging for successful early dispute resolution on an ongoing basis requires careful planning of a combination of elements. Even under these circumstances, it can be quite difficult to sustain an early dispute resolution program.

This article tells the story of inside counsel who successfully initiated PEDR systems, enlisting the support of key stakeholders by learning their interests and designing the systems to satisfy their interests.

Part II of this article describes the methodology in conducting this study through interviews about companies that have had or are developing PEDR systems. Part III summarizes the subjects' perspectives about the interests of the key stakeholders in business disputes—the lawyers and business people. Part IV describes elements of PEDR systems and the processes for developing them. Especially important elements include building support for the systems, changing the culture, designating individuals to manage the process, and using early case assessments. Part V lists recommendations for proponents of greater use of PEDR systems. These include development of resources to help companies implement PEDR systems, use of dispute system design methods, designation of PEDR counsel to manage the process, and making PEDR a valued part of the corporate culture. Finally, Part VI concludes that through careful and determined efforts, PEDR proponents can overcome substantial barriers to help many

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25. See text accompanying *supra* notes 10–16.

26. See TASK FORCE ON IMPROVING MEDIATION QUALITY, A.B.A., FINAL REP. 1, 6–13 (2008), <http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalTaskForceMediation.authcheckdam.pdf> (including principal findings about the importance of “preparation by mediator, counsel, and parties” and “case-by-case customization of [the] mediation process”); see also John Lande, *Doing the Best Mediation You Can*, DISP. RESOL. MAG., Spring/Summer 2008, at 43 (summarizing Task Force report).

27. Telephone Interview with Anonymous Source VII (Nov. 16, 2015) [hereinafter Interview VII] (explaining that one lawyer interviewed for the study does not like using mediation if it is done too early); see also John Lande, *Planning is Critically Important for Early Dispute Resolution*, INDISPUTABLY (June 11, 2015), <http://www.indisputably.org/?p=7194> (citing “refrain” of corporate lawyers complaining that “early mediation is a waste of time.”) Of course, sometimes unplanned early negotiation can produce good results, but businesses are likely to get better results on an ongoing basis by planning their dispute resolution processes.



business stakeholders “think and act different” about PEDR and, in doing so, advance their businesses’ interests.

## II. EMPIRICAL DATA

This study is based on fifteen semi-structured interviews conducted between September and December 2015. The interviews were conducted by telephone and generally lasted sixty to ninety minutes. In-depth interviews provide a much richer understanding of the complexities of issues surrounding the use of PEDR than is possible with large-scale standardized surveys. This approach complements the insights that can be derived from surveys, and this study suggests possible directions for future survey research.<sup>28</sup>

All but one of the subjects are, or have been, inside counsel for large corporations. One of the lawyers had moved from the legal department to a strategic business position from which he initiated the PEDR system for his company. One interview was of a lawyer in a large law firm who has advised between fifteen to twenty clients in developing PEDR systems. In this article, we refer to this lawyer with the pseudonym “Roger Webster.”

The inside counsel worked for large corporations, virtually all of which are “household names.” Six companies are among the one hundred largest corporations in the world and an additional six are among the one thousand largest corporations according to *Forbes Magazine*.<sup>29</sup> The companies operate in a wide range of industries including aerospace, agriculture, consumer products, finance, high-tech, insurance, manufacturing, medical devices, petrochemical, and pharmaceutical. The companies had a range of five to 1,300 inside counsel with a median of 160 inside counsel. The lawyers in this study had been practicing for a range of fifteen to forty-two years with a median of thirty years.<sup>30</sup> Two of the lawyers are former general counsel. Seven of the lawyers have served as “PEDR counsel.”<sup>31</sup> There were five women and ten men in the sample. Five of the subjects are retired.

The subjects were selected through a “snowball sampling” process. We started with individuals we knew, and we asked knowledgeable people to identify additional potential subjects. At the end of our interviews, we asked subjects to suggest others who worked for companies that used PEDR systems. Almost all of the names we received were inside counsel. Toward the end of the data collection process, we asked subjects for names of busi-

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28. See *infra* Section V.I.

29. Lawyers employed by thirteen companies were interviewed for this study. Two of the lawyers work for the same company. One lawyer worked for a large corporation that was acquired by another company and is not included in the figures regarding placement in the *Forbes* lists. One lawyer works for a private law firm.

30. For this purpose, the number of years in practice is calculated as the number of years since graduation from law school.

31. See *infra* Section IV.E (discussing PEDR counsel).

ness leaders and outside counsel who would be knowledgeable about PEDR systems and received virtually no such suggestions.

The subjects were promised confidentiality. We did not record or take complete verbatim notes of the interviews and most of the data reported in this article summarizes or paraphrases the subjects' statements. In some situations, we are confident that the reported language accurately reflects the subjects' words, which are shown in quotation marks.

The subjects were asked about the elements of the PEDR systems in their companies, who was responsible for initiating the systems, why they were initiated, how the systems were developed, the types of cases that are or are not suitable for PEDR, how well they thought that the systems worked, changes in their system over time, and advice about establishing PEDR systems in other companies. Time limitations and our interest in following up on particular issues meant that not all of the questions were asked of each subject.

The data in this study is derived from a small non-random sample and does not include interviews of corporate executives or outside counsel (with the exceptions noted above). Some of our subjects described their understanding of the perspectives of business people and outside counsel, and such characterizations may be based on limited knowledge and/or biases. Given these caveats, one should be careful about making generalizations from this data and we offer suggestions for future research to obtain a more complete understanding of PEDR systems.<sup>32</sup> Nonetheless, the subjects in this study were in position to provide critical insights about how and why their companies developed PEDR systems. Indeed, this research is very helpful in understanding why and how businesses adopt PEDR systems, the barriers in doing so, and how innovative lawyers and executives can overcome the barriers to advance their companies' interests.

### III. STAKEHOLDERS' GENERAL PERSPECTIVES

All of the subjects in this study are or have been litigators and feel strongly that there is a better way to handle most disputes than LAU. They engaged key stakeholders as they sought to implement PEDR systems, and their perception of these stakeholders' perspectives is summarized below. We have not interviewed members of these stakeholder groups, who might describe their perspectives differently. Moreover, the subjects provided generalizations, and there are almost certainly some exceptions. Nonetheless, the accounts in our interviews seem quite plausible and consistent with our general understanding of efforts to implement PEDR systems.

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32. See *infra* Section V.I (recommending future research).

### A. *Lawyers*

This part describes perspectives of various inside and outside counsel working for businesses, many of whom do not welcome innovations like PEDR. The orientation about disputing within a company may depend on who is in charge of the legal department. In particular, it may depend on that individual's management style, tolerance of conflict, recognition of costs that can be saved through conflict prevention, and relative priority of conflict management. One lawyer said that she finds that most leaders of corporate legal departments do not place a high priority on systematic conflict management.<sup>33</sup>

Corporate legal departments are responsible for handling numerous legal matters in addition to litigation, including transactions, governance, and regulatory compliance. Several lawyers observed that most leaders of corporate legal departments are not litigators and, as a result, may not see PEDR as necessarily adding value to the company.<sup>34</sup> One lawyer said that transactional lawyers focus on getting new deals and minimizing risk and generally do not think about matters in litigation, which they may feel is not as important as their work. As a result, they often just want the litigators to handle problems in litigation.<sup>35</sup>

Litigators generally have confidence in the litigation process, whether they are inside or outside counsel. One lawyer said, "Litigators like litigation because that's where they are important and in charge. It's what they *do* and what they are comfortable with."<sup>36</sup> She said that litigation gives them something to do, and reducing the amount of litigation would reduce the need for them. The status quo requires them to deal with many big issues, and they are "riveted on what is the threat or priority of the moment."<sup>37</sup> If inside counsel have a big litigation docket, they have to spend a lot of time on management and may not have enough time to focus much on dispute prevention or innovative dispute resolution options. They are "overwhelmed" and have to "pick and choose" where to focus their energy.<sup>38</sup> As a result, "litigation often gets outsourced" to outside litigators who continue to litigate as usual.<sup>39</sup>

Not surprisingly, litigators—including both inside counsel and outside counsel—often have an adversarial mindset and are contentious by training

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33. Telephone Interview with Anonymous Source X (Sept. 28, 2015) [hereinafter Interview X].

34. Interview VII, *supra* note 27; Telephone Interview with Anonymous Source IX (Dec. 7, 2015) [hereinafter Interview IX]. Late in the data collection process, we started asking how many litigators were employed in the companies' legal departments. We received estimates for three companies. In those companies, 5 to 15 percent of the inside counsel were litigators.

35. Interview II, *supra* note 22.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

and/or nature. Many litigators have an “entrenched belief” that they are expected to act like an “800-pound gorilla”<sup>40</sup> and “make things go away by being tough.”<sup>41</sup> These litigators feel that their job is to win battles by being a “warrior,” so settling cases is “a foreign idea.”<sup>42</sup> Many litigators do not want to admit that their clients were at fault or had any contribution to the problems. For them, willingness to negotiate or make any concession is an admission, which they see as a problem.<sup>43</sup> Some lawyers have a “confirmation bias” leading them to believe that the situation is exactly as their clients describe and the lawyers refuse to “listen to the facts.”<sup>44</sup> They believe that “we’re right and they’re wrong” and are not willing to consider another viewpoint, so they do not evaluate cases well.<sup>45</sup> One subject in our study said that lawyers tend to have big egos and do not want to hear that there is a better way to do what they are doing. One lawyer told him, “I know what you are saying, but I don’t want to sit around the campfire holding hands and singing Kumbaya.”<sup>46</sup>

Some of the “pushback” against using PEDR is about control. Some lawyers value their autonomy, and the last thing they want is to have headquarters second-guess how they assess and handle their cases. They do their own assessments of their cases and work with their bosses, so they wonder why they should have to do anything else.<sup>47</sup>

Litigators often want to complete discovery before they are ready to consider settlement. One lawyer identified what he called the “outside counsel problem,” which is their view that it is usually too soon to mediate because they do not have enough information.<sup>48</sup> Outside counsel often want to “harden their position” before they negotiate.<sup>49</sup> Similarly, another lawyer said that outside lawyers always wanted more time to get more discovery. He generally wanted to resolve the matters promptly without going to court, whereas outside counsel wanted to “play out the litigation process” hoping to get a better result.<sup>50</sup>

Thus it is not surprising that some litigators feel that early dispute resolution is inconsistent with their philosophy of litigation. The head of litigation at one company found that the lawyers who worked in his department

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40. Interview V, *supra* note 22.

41. Telephone Interview with Anonymous Source I (Oct. 5, 2015) [hereinafter Interview I].

42. Interview III, *supra* note 24.

43. Interview V, *supra* note 22; Interview X, *supra* note 33.

44. Interview X, *supra* note 33.

45. *Id.*

46. Interview III, *supra* note 24.

47. Interview IX, *supra* note 34; *see infra* Section IV.G (explaining that requirements to do early case assessments usually are critical elements of PEDR systems).

48. Telephone Interview with Anonymous Source XIV (Oct. 27, 2015) [hereinafter Interview XIV].

49. *Id.*

50. Interview XII, *supra* note 23.

“definitely were averse” to doing early case assessment.<sup>51</sup> They resisted using his “top-down methodology” for handling cases because they “treasured their independence, relationships with outside lawyers, and their own methodologies,” and they felt that doing early case assessments undermined these interests.<sup>52</sup> Similarly, he found that outside counsel displayed “extraordinarily entrenched opposition” to using early case assessments.<sup>53</sup>

Outside counsel often have a financial self-interest in engaging in LAU. One lawyer said that “outside counsel don’t want to use ADR because they know it works. When they are billing by the hour, [early dispute resolution] cuts their revenue.”<sup>54</sup> Another lawyer observed that there is an “inherent tension between inside counsel, who are considered as cost centers in their companies, and outside counsel, who are profit centers in their firms.”<sup>55</sup> Another said that early dispute resolution generally is not in the interest of outside lawyers unless they happen to be believers in the opportunities that ADR presents.<sup>56</sup> One lawyer suggested that lawyers in a firm are acting in good faith and don’t want to gouge clients, but they just do not see the clients’ bottom line. Their role is to do a good job in litigation, not business.<sup>57</sup> On the other hand, outside counsel may recognize that they have to cooperate with PEDR processes to continue to get work from some clients. One lawyer found that outside counsel have been very collaborative with the in-house lawyers and staff, which she attributes in significant part to the fact that they get most of their work from her company.<sup>58</sup>

### B. Business People

Lawyers in this study said that it generally is hard to get business managers to appreciate the advantages of PEDR because they have higher priorities, such as organizational restructuring or new technology initiatives.<sup>59</sup> Executives usually do not have the time or inclination to be educated about dispute resolution because they are preoccupied with other things and “if it’s not a fire that has to be put out, it doesn’t get priority attention.”<sup>60</sup> One

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51. Telephone Interview with Anonymous Source VIII (Dec. 3, 2015) [hereinafter Interview VIII].

52. *Id.*

53. *Id.*

54. Interview I, *supra* note 41; see Jeffrey M. Senger, *Turning the Ship of State*, 2000 J. DISP. RESOL. 79, 93 (explaining “private sector lawyers sometimes believe that ADR stands for ‘Alarming Drop in Revenue’”).

55. Interview III, *supra* note 24.

56. Telephone Interview with Anonymous Source IV (Nov. 4, 2015) [hereinafter Interview IV].

57. Interview II, *supra* note 22.

58. Telephone Interview with Anonymous Source XI (Oct. 9, 2015) [hereinafter Interview XI].

59. Interview XII, *supra* note 22.

60. Telephone Interview with Anonymous Source XIII (Oct. 26, 2015) [hereinafter Interview XIII].

lawyer said he would be “stunned” if the top executives would initiate a PEDR system, which is unconventional and something that they probably do not learn in business school.<sup>61</sup> So top business leaders generally delegate decisions about management of litigation to the senior legal leadership.<sup>62</sup> One lawyer said that executives’ supervision of dispute resolution usually does not go above the vice-president level. Some are “energetic and all over things like an insect,” but many generally defer to the legal department unless there is some reason to object.<sup>63</sup>

Business people often are uncomfortable about litigation—and litigators. One lawyer said that business people have a “general aversion” to litigators, who are the “last [people] you want in your door.”<sup>64</sup> By the time a problem becomes a dispute, they think, “What happens when it goes to legal?”<sup>65</sup> Business people generally feel that it is their job is to resolve problems every day, and they normally do not want litigators to do their job. They consider it almost as an insult: “What do you mean that we don’t know how to solve this problem?”<sup>66</sup> When disputes arise, they are embarrassed because it reflects poorly on them and it is not good for their careers. Indeed, litigators may be somewhat cynical about business people, feeling that their job is to “clean up after the elephants” who make a mess by creating disputes.<sup>67</sup> When business people get a lawsuit or a letter from a lawyer, their lawyers generally advise them not to talk with their counterparts who initiated the complaint. “Lawyers draw the battle lines, get right into discovery, and prepare for battle.”<sup>68</sup>

#### IV. ELEMENTS OF PEDR SYSTEMS AND PROCESSES

There is no uniform model of PEDR systems. Each company’s system is a function of its line of business, history of disputing, resources, corporate philosophy and culture, and the interests and actions of key stakeholders, among other factors. A former general counsel said that, based on his observations of companies, it is very difficult to generalize or to prescribe particular practices that a company may want to adopt.<sup>69</sup> There are too many variables within companies and between companies, and so much depends on implementation by the individuals involved.<sup>70</sup> As an example, he noted that there were two CEOs during his tenure as general counsel.<sup>71</sup>

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61. Interview I, *supra* note 41.

62. Interview VIII, *supra* note 51.

63. Interview I, *supra* note 41.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Interview III, *supra* note 24.

69. Interview XIV, *supra* note 48.

70. *Id.*

71. *Id.*

Although both CEOs generally liked the PEDR system, one was very principled and stood firm when making decisions in actual disputes and the other was more results-driven and pragmatic.<sup>72</sup> Considering the variations, he believes that it is important to keep the programs simple, focusing on a business orientation and collaboration between the legal department and the business operations.<sup>73</sup> Along the same lines, another lawyer noted variations within his company, suggesting that the need for flexibility in implementing PEDR systems is based on the particular types of stakeholders and disputes.<sup>74</sup>

It is important to distinguish between early *assessment* of cases and early *resolution*. In a PEDR system, companies routinely assess some or all of their cases at an early stage but may decide not to pursue early resolution in certain cases. Indeed, the early assessment is critically important in being able to decide how to manage particular cases.<sup>75</sup> Even if companies decide to pursue LAU in such cases, it is part of a PEDR system if they make these decisions as part of a regular procedure rather than simply a case-by-case determination.

This Part describes elements of various companies' PEDR systems, illustrating some of the variations between companies. The elements listed below generally are well known.<sup>76</sup> This study is helpful, though, in providing current views about elements that are particularly important, as well as in identifying implementation challenges and strategies.

### A. *Developing PEDR Systems*

PEDR systems can evolve gradually and/or be initiated through conscious planning.<sup>77</sup> In some companies in this study, in-house litigators took the initiative to develop these systems. In other companies, the PEDR systems gradually grew and eventually became more formalized. The latter might be called *Nike PEDR* systems: the lawyers just do it in their own

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72. *Id.*

73. *Id.*

74. Interview II, *supra* note 22.

75. This is why early case assessment is widely seen as the heart of a PEDR system. *See infra* Section IV.G.

76. *See generally* CRONIN-HARRIS, *supra* note 4, at 1–53 (providing suggestions for designing the system, developing tools, providing resources, motivating potential participants, and developing evaluation systems).

77. The Planned Early Dispute Resolution Task Force of the American Bar Association Section on Dispute Resolution published a user guide outlining a systematic approach for developing PEDR systems. It involves analyzing the company's history, developing an early case assessment process tailored to the company's situation, crafting dispute resolution procedures for disputes arising before and/or after the disputes arise, and considering legal fee arrangements aligning lawyers' and clients' interests. *See generally* John Lande, Kurt L. Dettman & Catherine E. Shanks, *User Guide: Planned Early Dispute Resolution*, A.B.A. SEC. OF DISP. RESOL. 1, 4–11 (2013) (co-sponsored by the American Arbitration Association, International Institute for Conflict Prevention and Resolution, and JAMS), [http://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/committees/PEDR/abadr\\_pedr\\_guide.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/PEDR/abadr_pedr_guide.authcheckdam.pdf).

cases, often without advance authorization of their superiors.<sup>78</sup> Over time, their procedures evolved and became more formalized, and the lawyers enlisted support of the general counsel and top business leaders.<sup>79</sup>

In one company, the lawyer started to adopt elements of a PEDR system on her own, and, during a performance review by her supervisor, she was assigned to institutionalize it.<sup>80</sup> Another lawyer said that she had the autonomy to do small experiments but she needed to work hard to get support from her superiors to expand the system. She needed to build consensus by demonstrating the potential for good results before those results became clear. So far, her internal clients are happy with the results, but they are reluctant to fully authorize the initiative because they are not sure about the ultimate results.<sup>81</sup>

In another company, a litigator had been using early dispute resolution techniques in his cases and described a few examples to the general counsel, who initially was cautious. The litigator convinced upper management to try PEDR on a small case and then on thirteen more cases. He demonstrated that he saved about \$1 million in this process, which helped him “sell” the process to top executives, who then supported an expansion of this effort.<sup>82</sup>

One former general counsel said the PEDR strategy in her company was not initiated at any particular time. Rather, it was a progression that did not mature until a few years into her tenure. When she started, the legal department had more of a “litigation orientation.”<sup>83</sup> She took time to establish credibility and “buy-in,” and only gradually reinforced the approach of taking control of disputes early and looking at them from a business perspective.<sup>84</sup> She had been active in the International Institute for Conflict Prevention and Resolution (CPR), so she had been exposed to best practices. She took the initiative to incorporate them into her company’s case management practices when working with the lawyers in her department as well as the business people she dealt with.<sup>85</sup>

One lawyer developed a PEDR system by carefully analyzing the nature and causes of the company’s disputes, their contracts, standard operating procedures, and (lack of) training that could lead to preventable disputes. She spoke with various people within her company, reviewed documents, evaluated potential liability, and brainstormed possible solutions.

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78. The reference to Nike refers to its slogan, “just do it,” not the company itself.

79. Interview III, *supra* note 24; Interview IV, *supra* note 56; Interview VII, *supra* note 27; Interview XI, *supra* note 58.

80. Interview V, *supra* note 22.

81. Interview XI, *supra* note 58. For further discussion of building support for PEDR systems, see *infra* Section IV.B.

82. Interview III, *supra* note 24.

83. Interview XIII, *supra* note 60.

84. *Id.*

85. *Id.*



She created procedures and materials (including template documents) for business people to handle many problems themselves. She also helped them learn from disputes so that they could avoid future disputes, for example, by correcting inaccurate product specifications.<sup>86</sup>

In some companies, lawyers studied other companies' programs and consulted a range of others for advice. For example, lawyers consulted with people who had developed PEDR systems in other companies, asking about what they thought would be effective.<sup>87</sup> In one company, the legal department convened a team to create a guidebook to help busy commercial lawyers quickly develop suitable ADR clauses as well as to help litigators in their department. The planners initially assumed that the document would be very brief, but it ended up being a book. They collected ADR clauses from the company's contracts and held a series of "brainstorming teleconferences" with commercial lawyers in their company as well as some of their outside counsel.<sup>88</sup> The guidebook identified ADR rules that the company favored and gave advice about constructing ADR clauses, considering factors such as the parties, likely business problems, and what could go wrong in ADR processes. It also provided general guidance about using ADR.<sup>89</sup>

One company is in the process of developing a PEDR system to make early assessments about the best way to handle different categories of cases. Planners consulted with their in-house constituents, academics, mediators and arbitrators, and their outside counsel so that they "didn't reinvent the wheel."<sup>90</sup> They also consulted with plaintiffs' attorneys to be sure that they "weren't drinking their own Kool-Aid."<sup>91</sup> Because of the sensitivity of consulting directly with plaintiffs' attorneys, they directed two of their outside counsel to contact several plaintiffs' attorneys without identifying their client. The PEDR planners "workshopped" their ideas with some of the people they consulted to get their feedback.<sup>92</sup> This involved distributing complaints they had received and role-playing how their system might work, which helped identify some issues they had not previously considered. They also considered other companies' experiences. They are planning to test their system as a pilot program and make any necessary adjustments before rolling it out generally. They believe that they need to establish the credibility of the program before expanding it.<sup>93</sup>

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86. Interview V, *supra* note 22.

87. Interview II, *supra* note 22; Interview III, *supra* note 24; Interview IV, *supra* note 56; Interview VIII, *supra* note 51; Interview XIV, *supra* note 48.

88. Interview I, *supra* note 41.

89. *Id.*

90. Telephone Interview with Anonymous Source VI (Nov. 6, 2015) [hereinafter Interview VI].

91. *Id.*

92. *Id.*

93. *Id.*

To initiate a formal PEDR system, one would need the “imprimatur of the general counsel,” which would make management more open to it.<sup>94</sup> General counsel set the culture of their legal departments, and, if they are not interested in PEDR, case management is likely to be haphazard and ad hoc.<sup>95</sup> For a PEDR system to develop successfully, it needs an influential advocate in the legal department. This would be the general counsel or someone right below him or her in the organization chart.

Roger Webster, the outside counsel who has assisted many companies in developing PEDR systems, said that, in his experience, the legal departments initiated and designed the systems and the business leaders were “brought along” only at the end.<sup>96</sup> Even though the business leaders may think that PEDR is a great concept, it may be hard to convince them of its value because the benefits can be difficult to measure.<sup>97</sup> A lot depends on whether the general counsel or head of litigation is a supportive “change agent.”<sup>98</sup> They have to believe that it will lead to positive results or else they may feel that there is very little incentive within the usual corporate environment.<sup>99</sup>

One lawyer said that the business leaders were not involved in initiating or designing the system in her company other than being supportive after she developed it. At that point, business managers understood how to handle some disputes on their own, without needing help from the legal department.<sup>100</sup> However, even after a PEDR system was developed in one company, the lawyer responsible for the system said that there still were considerable challenges in getting the support of the C-Suite. “While the program is consistent with our strategy and corporate values, it is really not driven by upper management.”<sup>101</sup> She hopes that the corporate culture and attitudes will change when she can demonstrate positive results.<sup>102</sup>

In another company, the PEDR process originated with the CEO, which led to “buy-in across the board.”<sup>103</sup> The PEDR process was a very different approach to their business “once we realized that litigation was a huge drain and we weren’t doing as well as we could even when we won.”<sup>104</sup> With the approval of its antitrust lawyers, the company developed PEDR processes specifically for dealing with disputes with their major

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94. Interview I, *supra* note 41.

95. Interview VII, *supra* note 27.

96. Interview IX, *supra* note 34.

97. For discussion of the difficulties in measuring benefits of PEDR systems, see notes 136–37 below.

98. Interview XII, *supra* note 23.

99. *Id.*

100. Interview V, *supra* note 22.

101. Interview XI, *supra* note 58.

102. *Id.*

103. Telephone Interview with Anonymous Source XV (Nov. 6, 2015) [hereinafter Interview XV].

104. *Id.*

competitors with whom they have ongoing relationships. Timing was important as they did not want to develop a PEDR system with a competitor when there was a dispute “brewing” between them.<sup>105</sup> This company approached one competitor after they won a big case against that competitor. The CEOs from both companies met and signed an agreement establishing a framework for their relationship. This company used a similar process of developing relationships with its other major competitors. The biggest hurdle was getting “buy-in” from leadership of other companies.<sup>106</sup> High-level business people contacted their counterparts suggesting that disputes were getting in the way of their important relationships and asked if they would like to pursue a relationship-based process. In making this approach, “you have to be willing to let your guard down a little bit and show a little skin.”<sup>107</sup>

When the counterparts responded positively, the business people turned it over to the lawyers to develop the details of the process. They convened teams to develop a document governing their working relationship. This was an “umbrella” agreement that covers functions in addition to legal disputes.<sup>108</sup> The document outlined past problems and future aspirations while acknowledging that the companies still compete aggressively. They committed to avoid litigation and give each other advance notice of any lobbying or advocacy in a public forum. When disputes arise, business people are actively involved and the disputes do not just get “handed off to the law departments.”<sup>109</sup> There now is a system for handling disputes rather than a process of handling individual disputes as they arise. In contracts with companies other than their major competitors, they include stepped dispute resolution provisions.<sup>110</sup>

This overview shows that the process for developing corporate PEDR systems is quite varied and depends on the circumstances of each company.

### *B. Building Support for PEDR Systems*

To fully succeed in institutionalizing a PEDR system, proponents must engage all the stakeholders, learn their key goals and interests, consider options that would satisfy them, design the system to satisfy them, and publicize their successes to show that the system works.<sup>111</sup> Roger Webster said that “what drives everybody to look at this is the desire to resolve disputes in as quick and efficient manner as possible and to do so in a way that is

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105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Interview XV, *supra* note 103.

110. *Id.*; see *infra* Section IV.F (discussing dispute prevention and resolution contract clauses).

111. Interview XIII, *supra* note 60.

beneficial for the company.”<sup>112</sup> Litigation often involves substantial expense, especially for discovery. If lawyers can reduce the expenses and resolve the cases more efficiently, the company can use the saved resources for other purposes.<sup>113</sup> Lawyers in this study said that PEDR systems can satisfy multiple interests including reduction in the time and expense of litigation,<sup>114</sup> achievement of better outcomes,<sup>115</sup> maintenance of business relationships,<sup>116</sup> protection of privacy,<sup>117</sup> protection of reputations,<sup>118</sup> greater control of disputes,<sup>119</sup> reduction of risk,<sup>120</sup> improvement in relationships between inside litigators and business leaders in their company,<sup>121</sup> and improvement in coordination between companies and their outside counsel (with companies generally exercising greater control over the outside counsel).<sup>122</sup> One lawyer said that the primary motivation for developing his company’s PEDR system was that it simply is “a better way to do business.”<sup>123</sup>

Proponents may be successful if they can persuade stakeholders that the systems will help them solve their difficult problems and make them look good to others in the company. Proponents need to understand the stakeholders’ concerns, be clear about the risks, and be prepared to defer an initiative unless and until the stakeholders are ready. A former general counsel said that there is a need to “bring people along and not get out too far ahead.”<sup>124</sup> She said that this is a “management and interpersonal issue that good general counsel should know how to do, though many don’t.”<sup>125</sup> One lawyer said that some people were skeptical when she started to develop the PEDR system in her company. She tried to address their (implicit)

112. Interview IX, *supra* note 34.

113. Interview IV, *supra* note 56.

114. Interview II, *supra* note 22; Interview III, *supra* note 24; Interview IV, *supra* note 56; Interview V, *supra* note 22; Interview IX, *supra* note 34; Interview XI, *supra* note 58; Interview XIII, *supra* note 60.

115. Interview I, *supra* note 41; Interview II, *supra* note 22; Interview III, *supra* note 24; Interview IV, *supra* note 56; Interview V, *supra* note 22; Interview XI, *supra* note 58.

116. Interview I, *supra* note 41; Interview III, *supra* note 24; Interview XII, *supra* note 23; Interview XV, *supra* note 103.

117. Interview V, *supra* note 22.

118. Interview I, *supra* note 41; Interview IX, *supra* note 34; Interview XIII, *supra* note 60. A lawyer in one company noted that his company is not generally portrayed favorably in the public. The company’s PEDR initiative reflects a corporate goal of earning respect for making positive contributions to society and philosophy of treating people with respect, fairness, and timeliness. Interview IV, *supra* note 56.

119. Interview VII, *supra* note 27; Interview VIII, *supra* note 51; Interview IX, *supra* note 34; Interview XII, *supra* note 23; Interview XV, *supra* note 103.

120. Interview V, *supra* note 22; Interview XIII, *supra* note 60; Interview XIV, *supra* note 48.

121. Interview XIV, *supra* note 48.

122. Interview XI, *supra* note 58; Interview XIV, *supra* note 48.

123. Interview XV, *supra* note 103.

124. Interview XIII, *supra* note 60.

125. *Id.*

question, “What’s in it for me?”<sup>126</sup> Rather than imposing a program, she tried to understand her clients’ needs and how a PEDR system could help them improve their own job performances. This was important because the clients felt that previous PEDR efforts had not advanced their interests.<sup>127</sup>

Many stakeholders have had negative experiences with litigation. PEDR counsel can help design systems to avoid or minimize the downside of such experiences in the future.<sup>128</sup> For example, in one company, business leaders felt that disagreements unnecessarily escalated into disputes and that the litigation docket was unwieldy and too expensive. So the PEDR system was designed to prevent management behavior that was likely to lead to disputes and, when disputes arose, to better manage the litigation. The PEDR counsel sought to understand the “root causes” of disputes and develop dispute prevention processes.<sup>129</sup> She said, “It’s not our goal to win litigation. It’s our goal *not to have litigation*.”<sup>130</sup>

In another company, the business leaders felt that litigation cost “way too much,” created unnecessary risk and acrimony, and shifted too much power from the business people to the lawyers.<sup>131</sup> So the PEDR counsel helped develop a system in which business people from companies in ongoing relationships met regularly to prevent and resolve problems themselves.<sup>132</sup>

It is important that stakeholders learn about new systems and the benefits that they provide.<sup>133</sup> Lawyers who want to institutionalize PEDR in their companies often need to make the business case to the internal stakeholders using data to demonstrate the economic benefits. Case management systems may produce data on costs, cycle times of disputes, and other factors that may help make the case for PEDR.<sup>134</sup> When developing a PEDR system, lawyers do not have experience in their own companies to demonstrate the benefits, so this may be a “chicken and egg” process because they do not have data of their own. Proponents can take advantage of success stories of well-known companies to demonstrate that PEDR can add value.<sup>135</sup>

In one company, lawyers used data about the financial benefits of PEDR to address skeptics’ concerns. A lawyer in the company said, “ADR

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126. Interview XI, *supra* note 58.

127. *Id.*

128. Interview V, *supra* note 22; Interview XII, *supra* note 23; Interview XIII, *supra* note 60. For a discussion of PEDR counsel, see Section IV.E *infra*.

129. Interview X, *supra* note 33.

130. *Id.*

131. Interview XV, *supra* note 103.

132. *Id.*

133. Interview I, *supra* note 41.

134. Interview VIII, *supra* note 51.

135. See CRONIN-HARRIS, *supra* note 4; Weise, *supra* note 5; *infra* Section IV.G; Armstrong, *supra* note 6; Villareal, *supra* note 7; Burt, *supra* note 9.

pisses off a lot of people who see the world in black and white, especially some business colleagues.”<sup>136</sup> Initially, to get the CEO and others “on board,” the lawyers provided charts showing quantitative benefits.<sup>137</sup> They demonstrated that the company avoided having to pay tens of millions of dollars considering reductions of out-of-pocket and legal costs as well as reductions in liability. After they established credibility within the company, they did not need to continue documenting savings from PEDR.<sup>138</sup>

In another company, the PEDR counsel collected data to demonstrate that their use of mediation was consistent with corporate objectives of reducing litigation costs while obtaining reasonable settlements. The data also helped them design their system and train employees, which helped generate “buy-in” by addressing their concerns.<sup>139</sup> They compared the cost, case duration, and results of trial and late settlement with early resolution. The business people wanted to be sure that they were saving money while making appropriate settlements. They found that most of the cost savings came through the reduction of litigation costs, not in lower settlements. The PEDR counsel said that she was able to demonstrate success and greater efficiency in their dispute resolution process, which made people “happier.”<sup>140</sup>

In yet another company, after cases were completed, the PEDR counsel reviewed the cases with inside counsel to calculate how much the company spent, and they made a “guesstimate” of how much it would have spent in normal litigation.<sup>141</sup> The difference was calculated as the savings. He said that accountants may want to know how they got those numbers and may be concerned if the numbers are “too loosey-goosey. . . . It would help if you could get hard numbers but you don’t know for sure that’s how much you saved.”<sup>142</sup> He wanted to make sure that the numbers were credible, so in calculating the savings, he did not take credit for reducing liability (or exposure to liability) or time saved by inside counsel or business leaders. As part of the annual report from the legal department, he did an annual review to demonstrate to the top executives that they added value. They started small and found significant savings in the first year. The amount of savings increased in subsequent years.<sup>143</sup>

Commercial lawyers and those handling various specialties need to understand how litigators can create value for their company. One lawyer said that if litigators provide “vibrant ADR,” their colleagues “get it.”<sup>144</sup> Having

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136. Interview II, *supra* note 22.

137. *Id.*

138. *Id.*

139. Interview XI, *supra* note 58.

140. *Id.*

141. Interview III, *supra* note 24.

142. *Id.*

143. *Id.*

144. Interview I, *supra* note 41.

good experiences with mediation can change the “climate of the company” for both the legal and business people.<sup>145</sup> One lawyer said that his company had many disputes and required an effective approach to preserving relationships, particularly within his industry. It used prominent, highly capable mediators, which had a significant impact on attitudes about ADR within the company.<sup>146</sup>

Since litigators normally do not negotiate commercial transactions, it may take some “salesmanship” with in-house commercial lawyers to get them to understand the value of well-crafted dispute resolution clauses and to enlist the help of litigators when they negotiate commercial deals.<sup>147</sup> These clauses can be complex, involving such things as limitations on discovery, the process for selection of neutrals, and internal appellate procedures. One PEDR counsel said that it may take “a substantial proselytizing effort” to persuade transactional lawyers to develop good ADR clauses.<sup>148</sup> He said that if the clauses are out of the ordinary, the other side may suspect that you are trying to put them at a disadvantage. Negotiating these clauses involves additional work for the transactional lawyers, and so they have to feel that there is a “payoff” to devoting time and effort to negotiating these terms.<sup>149</sup>

Litigators may also need to persuade in-house colleagues who handle transactional and regulatory matters that when problems arise, they should promptly involve dispute resolution experts to help assess the situation and increase the chance of settling the matter or prevailing if they go to trial. In these situations, it is important to review the documents and talk with the witnesses to get a realistic understanding of their position, “not just what the clients want it to be.”<sup>150</sup>

Companies may also increase support for their PEDR systems by creating incentives to use them. Linking inside employees’ compensation to PEDR goals may contribute to their acceptance of the process. In one company, employees are evaluated on how well they manage their areas of responsibility, and early dispute resolution allowed them to increase their effectiveness.<sup>151</sup> In another company, however, inside litigators’ compensation was based on their diligence, hard work, and good results in high visibility cases, not the speed or quality of settlements, which were hard to compare because of the variation in the cases. The PEDR counsel believed that he saved a lot of money for the company through negotiation, and he joked that they should pay him on contingency, not a salary.<sup>152</sup>

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145. Interview XIV, *supra* note 48.

146. *Id.*

147. Interview VIII, *supra* note 51.

148. *Id.*

149. *Id.*

150. Interview VII, *supra* note 27.

151. Interview XII, *supra* note 23.

152. Interview III, *supra* note 24.

### C. *Changing the Corporate Disputing Culture*

One lawyer described the process of developing PEDR systems as a “cultural project,”<sup>153</sup> and another said that the decision whether to employ a PEDR system is a “cultural and values issue.”<sup>154</sup> In one company, key stakeholders came to appreciate that PEDR provides a more sustainable way to deliver value. So it is now part of their business strategy and legal culture.<sup>155</sup> Roger Webster said that organizations like CPR are critically important in encouraging development of PEDR systems because they are viewed as helping companies find ways to resolve disputes in the best possible manner. The more that CPR and other providers educate companies about the value of PEDR, the more the companies will be comfortable with it.<sup>156</sup>

Adopting a PEDR system is easier when it is consistent with the general corporate culture, and it helps if the company values systematic processes and measures the performance of its litigation department.<sup>157</sup> For example, a PEDR system was established in a “learning company” which has a culture of checking assumptions and looking for improved business methods.<sup>158</sup> In another company, the PEDR system was consistent with the company’s overall business objectives, which made it easier for the general counsel to move in the direction she devised for the system. So she had considerable latitude to “inculcate these best practices” in the legal department.<sup>159</sup> A Japanese company was receptive to a PEDR system because it addressed cultural concerns of Japanese business leaders who hated litigation as they felt that discovery was an invasion of their privacy and that litigation created excessive risk.<sup>160</sup> In a company that currently is developing a PEDR system, the company has been moving away from a “culture of fighting,” so adopting the system is consistent with broader underlying cultural shifts in that company.<sup>161</sup>

If PEDR is not generally consistent with the corporate legal culture, however, companies may not undertake a PEDR strategy unless they have a leader who is a change agent willing to undertake something that may require additional time and effort.<sup>162</sup> In one company, for example, a lawyer had to work hard to get the support of the general counsel and especially the CEO.<sup>163</sup>

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153. Interview I, *supra* note 41.

154. Interview XIII, *supra* note 60.

155. Interview II, *supra* note 22.

156. Interview IX, *supra* note 34.

157. *Id.*

158. Interview II, *supra* note 22.

159. Interview XIII, *supra* note 60.

160. Interview V, *supra* note 22.

161. Interview VI, *supra* note 90.

162. Interview XII, *supra* note 23.

163. Interview III, *supra* note 24.



One former general counsel described her approach to developing the legal culture she wanted. She encouraged her litigators to think strategically about ways they could create value for their company. She said that they should think like business people and view matters as part of a business strategy, not just legal issues. The company had a general culture of looking for best practices by asking if there was a better way to do something. Their PEDR system reflected this culture in the legal department, which became self-reinforcing. She educated executives and gained their support in the particular cases they were involved in, which paved the way for them to support this approach generally. In specific cases, she talked with clients who thought they were right and could not see the other side, and she helped them understand the risks and potential benefits of the options, including settlement.<sup>164</sup>

Lawyers in this study emphasized the importance of changing the mindsets of inside litigators. One lawyer said that using a systematic PEDR approach is really a matter of basic competence as a lawyer and that it should almost be a violation of the code of ethics if litigators are not systematic in handling their cases.<sup>165</sup>

A former general counsel pressed inside litigators in his company to have a cultural and strategic business orientation and not merely a “check-the-box” approach in a formalized system.<sup>166</sup> Since then, he has generally observed an increase in “in-house ownership” of dispute resolution, even in companies that do not have PEDR systems.<sup>167</sup> He said that most in-house departments do not defer to outside counsel as much as they used to, which is a big shift from the 1990s. He also said that many inside counsel are motivated particularly to achieve cost reduction and rigorous case management even if they do not focus on early resolution. In-house ownership is especially important as a means to advance PEDR. It is not a rejection of outside counsel but rather a recognition that change will come from within companies. In his company, he worked hard to promote in-house ownership by refusing to accept explanations for decisions based merely on the advice of outside counsel.<sup>168</sup>

A lawyer responsible for developing a major PEDR system said that the legal department in his company had to get the message through to lawyers in various ways, almost like advertising, even with things like messages on door magnets.<sup>169</sup> Symbols and language can have an important impact. A former general counsel said that after they had general “buy-in” for a PEDR approach within his company, they renamed the litigation de-

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164. Interview XIII, *supra* note 60.

165. Interview II, *supra* note 22.

166. Interview XIV, *supra* note 48.

167. *Id.*

168. *Id.*

169. Interview I, *supra* note 41.

partment to add “dispute resolution” to the title of the department and individual lawyers.<sup>170</sup> He said that this made a “huge difference.”<sup>171</sup> It may also help to develop distinctive names and logos for companies’ PEDR systems to give them concrete identities.

#### *D. Dealing with Resistance*

Given the general perspectives of corporate lawyers and executives described above,<sup>172</sup> proponents of PEDR approaches should expect some resistance and develop strategies to deal with it effectively. One lawyer described “pockets of resistance” in his company which can require ongoing training and education for people to appreciate the benefits of their system.<sup>173</sup> There can be some professional risk to company managers or inside counsel if a PEDR strategy is different from the culture in the legal department or the company generally. These employees may think, “Why push the envelope when you don’t have to do so?”<sup>174</sup>

Adopting a PEDR system is hard when it is not obviously consistent with the general corporate culture or does not have the support of the business leaders. For example, one lawyer said that there is a competitive culture in her company, so change depends on how well initiatives are positioned to attract support and become priorities. She said that her company is a big place and that people have their own way of looking at things, so change takes a long time. Their PEDR system is relatively limited and handles a fairly small percentage of its cases. For two years, an “internal think tank” has been considering how to provide negotiation skills training with the goal of getting greater “buy-in” to their PEDR program, enabling them to expand it.<sup>175</sup>

One lawyer said that it was hard to get some litigators in his company to “buy into a new paradigm.”<sup>176</sup> He mentioned a common view of some litigators that cases have to be “ripe” before lawyers are ready to start negotiating.<sup>177</sup> They typically want to conduct more discovery, and the lawyer had to persuade them that they had enough information early on from their in-house investigations to negotiate. He described “a battle against the old way of doing things” as the litigators were comfortable with the way that

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170. Interview XIV, *supra* note 48.

171. *Id.*

172. *See supra* Part III.

173. Interview XI, *supra* note 58.

174. Interview XII, *supra* note 23.

175. Interview XI, *supra* note 58.

176. Interview III, *supra* note 24.

177. *Id.* Another lawyer had a similar experience. She would sometimes get into arguments with outside counsel because she wanted to go to mediation as early as possible believing that people generally knew the facts, but her outside counsel often wanted to wait until they got more information. Interview V, *supra* note 22.

things always had been done, and they were reluctant to change.<sup>178</sup> Another lawyer said that if the corporate legal culture is not oriented to PEDR, it takes a lot of sustained effort to enforce a PEDR “methodology” from the top down.<sup>179</sup> This is a significant cultural change to shift lawyers’ mindsets from the “bread and butter model of litigation” to early case analysis.<sup>180</sup> In trying to change that mindset, one may need to operate “in the margins,” and it may take time to “seep into” the way that lawyers manage their cases.<sup>181</sup>

One company’s PEDR system became more embedded in its culture through training of 120 lawyers, starting with litigators and later with personnel handling contract and program functions.<sup>182</sup> Another company worked to establish a PEDR culture by holding annual meetings and periodic trainings with outside law firms to explain their goals and methods and get alignment between the company and the outside counsel.<sup>183</sup> One company gave an award to the PEDR counsel for her work, which is a way to send a signal about what is valued in the corporate culture.<sup>184</sup>

#### *E. Designating PEDR Counsel*

Some companies designate inside counsel to oversee their ADR activities. Typically, this is only part of their responsibilities, and they may not have a formal title in this capacity. In some companies, the head of litigation may perform this function.<sup>185</sup> While these lawyers may be referred to as “ADR counsel,” they may perform a range of functions to help companies systematically plan for dispute resolution at the earliest appropriate time. So it would be appropriate to consider such lawyers as “PEDR counsel.”

Roger Webster, the outside counsel who has advised numerous companies in developing PEDR programs, said that for some companies, it is absolutely necessary to have someone perform this role. Other companies can manage without a designated PEDR counsel coordinating the initiative, though they are more likely to succeed if they have someone specifically charged with overseeing the process and helping business people understand it.<sup>186</sup>

One such lawyer said that she developed materials, provided training, gave presentations for business people, and helped prepare clients for medi-

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178. Interview III, *supra* note 24.

179. Interview VIII, *supra* note 51.

180. *Id.*

181. *Id.*

182. Interview XII, *supra* note 23.

183. Interview VIII, *supra* note 51.

184. Interview V, *supra* note 22.

185. Interview VIII, *supra* note 51.

186. Interview IX, *supra* note 34.

ation.<sup>187</sup> In one company, a lawyer was tasked with managing the development of their PEDR system. She said that the company needed to have one person in that role to “own” the system.<sup>188</sup> In another company, the general counsel appointed a litigator in her department to make sure that lawyers performed the required case analyses, and the general counsel thought it was very helpful to have someone perform this function.<sup>189</sup> In yet another company, the PEDR counsel was available to provide advice, often helping litigators find good mediators. His company had cases all over the world and had relationships with local firms, so he would ask those firms for recommendations about good local mediators.<sup>190</sup>

In one company, the PEDR counsel was actively involved in litigated cases, helping to strategize about the company’s position and look for ways to solve problems. She institutionalized the PEDR process by training employees in the legal department, contracts division, and customer service department. She developed packets of materials such as a letter acknowledging receipt of a claim within a week. Employees were supposed to substantively and respectfully respond to claims within two to four weeks. The letters would acknowledge understanding of the complaints and promptly “put [the company’s] cards on the table” by describing the results of their assessment. Sometimes the company would admit having responsibility and other times, it would simply state that it valued the claimants as customers and propose a solution. It would invite claimants to provide more information if they wanted. Part of her job included acting as a “mediator and honest broker” between departments to allocate internally who should bear the cost of handling customers’ problems. If a supplier or dealer was part of the problem, she worked with them to arrange their contributions to the resolution.<sup>191</sup>

PEDR counsel may focus on only part of their companies’ dockets. For example, one lawyer was responsible only for international cases.<sup>192</sup> For two others, their companies’ PEDR programs are limited to certain classes of cases and they are not involved in other cases.<sup>193</sup>

#### *F. Using Dispute Prevention and Resolution Contract Clauses*

Many companies use dispute resolution clauses in their contracts, which is an important form of planning for early dispute resolution. These provisions are especially important for international commercial contracts

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187. Interview V, *supra* note 22. For a discussion of training and educational materials, see Section IV.J *infra*.

188. Interview VI, *supra* note 90.

189. Interview XIII, *supra* note 60.

190. Interview III, *supra* note 24.

191. Interview V, *supra* note 22.

192. Interview VII, *supra* note 27.

193. Interview III, *supra* note 24; Interview XI, *supra* note 58.

because arbitration is so widely used to deal with disputes arising from these contracts, and the provisions can have a major impact on the process and outcome.<sup>194</sup> Contract clauses also are widely used in the domestic context, especially involving agreements to mediate. Obviously, contract clauses are not relevant to non-contractual disputes, such as tort claims.<sup>195</sup>

Some companies have carefully analyzed a range of options for these clauses and developed sophisticated options for their contracts.<sup>196</sup> Some companies use “stepped” procedures, where parties use a series of dispute resolution procedures, typically beginning with non-binding processes like negotiation and mediation and, if the parties do not settle, submitting the dispute to arbitration.<sup>197</sup> Some contracts create incentives for negotiation by including jury waivers and attorney fee-shifting clauses.<sup>198</sup>

Some companies use provisions for dispute *prevention* in addition to dispute resolution. In one company, this approach was an outgrowth of an effort for lawyers to “look at law as a business partner,” not just as a lawyer.<sup>199</sup> In another company, teams from each company work directly with each other, meeting at least once a quarter, which has been successful in preventing litigation.<sup>200</sup>

One PEDR counsel said that in-house commercial lawyers really understand the downside of litigation in terms of “uncertainty, lost creative talent time, spooked clients, fighting in litigation,” and the cost of e-discovery, which can cost hundreds of thousands of dollars.<sup>201</sup> Commercial lawyers generally want an efficient process in which they can pick decision-makers. By contrast, in court, the decision-makers may not even have a high school diploma.<sup>202</sup>

Developing dispute resolution provisions provides an opportunity for litigators to collaborate with commercial lawyers who negotiate and draft the contracts. For example, one lawyer said that his commercial colleagues regularly consult him about this.<sup>203</sup> Similarly, another lawyer coached her transactional colleagues in tailoring dispute resolution clauses to particular contracts instead of using “boilerplate clauses.”<sup>204</sup> In one company, commercial lawyers are required to consult with litigators for approval of the dispute resolution provisions in their contracts. The litigators provide train-

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194. Interview VII, *supra* note 27; Interview VIII, *supra* note 51.

195. Interview VI, *supra* note 90.

196. Interview I, *supra* note 41; Interview IV, *supra* note 56.

197. Interview XV, *supra* note 103; *see also infra* Section IV.I (discussing stepped dispute resolution procedures).

198. Interview V, *supra* note 22.

199. Interview XIV, *supra* note 48.

200. Interview XV, *supra* note 103.

201. Interview I, *supra* note 41.

202. *Id.*

203. Interview VII, *supra* note 27.

204. Interview III, *supra* note 24.

ing for their commercial colleagues about dispute resolution clauses.<sup>205</sup> Companies can periodically review their satisfaction with dispute resolution processes and make adjustments in their contract provisions in subsequent contracts.

### *G. Conducting Early Case Assessments*

Virtually all of the subjects in this study said that their companies use early case assessments (ECA). Companies represented in this study carefully developed their ECA processes, with some lawyers calling it an “essential” or “critical” element that is the “heart” or “core” of their PEDR systems.<sup>206</sup> Businesses can benefit from in-depth early assessment of parties’ interests and options, which makes it easier to settle cases because they are not “burdened” by a lot of fees from lengthy litigation.<sup>207</sup>

Generally, it is appropriate to conduct ECAs in every case, recognizing that the amount of time invested in the process should be proportional to the value of the case to the company and uncertainty about the best way to proceed. One lawyer said that it is impossible to properly advise clients about likely court outcomes without doing an ECA. He said that it is essentially just “good legal management” and has become part of the culture in his company.<sup>208</sup> A former general counsel said that an ECA helps to “prevent you from drinking the Kool-Aid” and becoming a partisan of the case.<sup>209</sup> She insisted that her lawyers “step out of [their] own perspective” because this helps identify potentially bad outcomes.<sup>210</sup> They also had to consider if there was a “way to resolve it short of full-blown litigation that would be to our advantage.”<sup>211</sup> In one company, the ECA process dramatically changed the corporate culture as people regularly refer to ECAs. The business lawyers now often ask for ECAs because they see ECAs as an important way to understand problems and communicate with litigators. The process has become so ingrained in the legal culture that failure to do ECAs is noteworthy. So someone might ask, “Who is the idiot who forgot to do the ECA?”<sup>212</sup> Or someone might apologize for not having an ECA.<sup>213</sup> In other companies, the ECA process is not valued as much. For example, in one company, despite a requirement to complete an ECA within sixty

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205. Interview XII, *supra* note 23.

206. Interview V, *supra* note 22; Interview VI, *supra* note 90; Interview VII, *supra* note 27; Interview IX, *supra* note 34; Interview XV, *supra* note 103.

207. Interview VII, *supra* note 27.

208. *Id.*

209. Interview XIII, *supra* note 60.

210. *Id.*

211. *Id.*

212. Interview II, *supra* note 22.

213. *Id.*

days, inside counsel had a tendency to turn the cases over to outside counsel without doing careful assessments.<sup>214</sup>

CPR published a Corporate Early Case Assessment Toolkit, which identified eleven steps in the ECA process:

(1) capture matter information and assemble team; (2) [conduct] informal factual review; (3) [identify] business concerns; (4) [perform] forum and adversary analysis; (5) [perform] risk management analysis; (6) [perform] legal analysis; (7) [perform] cost/benefit analysis; (8) determine settlement value; (9) establish settlement strategy; (10) develop preliminary litigation plan; [and (11) conduct post-resolution review to develop strategy for preventing future disputes].<sup>215</sup>

Lawyers in this study referred to all of these elements, though most companies presumably do not routinely include all of them.

Some lawyers argued that lawyers should not limit their assessments to “cases” in litigation but should perform similar assessments for disputes that have not yet resulted in lawsuits.<sup>216</sup> Thus one lawyer suggests that when transactional lawyers learn of “incipient disputes” in contracts, they should engage litigators early to increase the chances of resolving the matter and prevailing if adjudicated.<sup>217</sup>

In conducting an ECA, one should review all the available documents, interview witnesses, and interpret the law to develop a realistic understanding of the company’s position.<sup>218</sup> One lawyer emphasized the importance of lawyers conducting early interviews with clients and listening carefully to their actual words to understand their business needs before the matter is “colored by legal analysis.”<sup>219</sup> He said that this approach involves a large investment of time, but it builds trust with clients and saves time in the long run.<sup>220</sup> Another lawyer said that when she received claims, in addition to reviewing documents, interviewing witnesses, and analyzing the merits of the case, she would consider other factors, such as whether it was likely to be an isolated or repeated problem, how important was the customer, and potential resolutions. She often used experts early in the process. For example, she used an expert to help assess liability and damages in a patent

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214. Interview III, *supra* note 24.

215. CORPORATE EARLY CASE ASSESSMENT COMMISSION, *Corporate Early Case Assessment Toolkit* 4–20 (Int’l Inst. for Conflict Prevention & Resol., 2009), <http://www.cpradr.org/Portals/0/Home/CPRECAToolkit2010.pdf>. See CLAIMS & LITIG. MGMT. ALLIANCE, *The Claims and Litigation Management Alliance Guidelines* 2, 9–12, <https://www.theclm.org/Uploads/ContentPage/clm-guidelines.pdf> (guidelines recommending that insurance defense counsel develop “initial evaluation and litigation plans” summarizing the issues in the case and recommending whether the case should be “resolved early”).

216. Interview IX, *supra* note 34.

217. Interview VII, *supra* note 27.

218. *Id.*

219. Interview I, *supra* note 41.

220. *Id.*

infringement case.<sup>221</sup> Another lawyer said that the ECAs in his company focused on the key facts, what is known, what is unknown, possible defenses, the likelihood of success, experience with opposing counsel, the best “landing spot,” and what steps should be taken.<sup>222</sup> One lawyer noted that ECAs should address business issues with the other party, including possible ways to resolve the dispute such as developing a licensing agreement in an intellectual property dispute.<sup>223</sup>

The inside counsel might conduct the ECA, ask outside counsel to do so, or they could do it together.<sup>224</sup> In one company, when inside counsel handle cases, the ECAs cover the same elements as required of outside counsel, though they generally are not as thorough.<sup>225</sup>

One lawyer described the ECA as a two-step process. Lawyers would first evaluate the merits and the risks and then consider the best process to resolve the matter. The lawyers had to involve the business people in this discussion and would try to get business executives to negotiate directly with their counterparts on the other side. If that was unsuccessful, they would explore mediation.<sup>226</sup> One company in this study currently uses materials developed by CPR, particularly the suitability screening tool for mediation and other ADR processes.<sup>227</sup>

One lawyer said that as part of an ECA process, she sometimes would meet with the business people and lawyers on the other side to understand the case and start the process of resolving it.<sup>228</sup> A lawyer currently overseeing the development of the PEDR system is planning to use ECAs and early negotiation to satisfy plaintiffs while minimizing the company’s liability. Recognizing that many plaintiffs have a strong interest in “being heard” and getting explanations and apologies, he wants to settle more cases early, ideally before plaintiffs retain lawyers. From his perspective, plaintiffs’ lawyers take 40 percent of the recovery and cause a lot of problems. In his company’s ECAs, they may focus on the impact that opposing counsel will have on the cost of a dispute and its potential outcome, taking into consideration which lawyers are representing the plaintiffs, whether they are willing to do the work to litigate effectively, whether they are capable of trying cases, and if they regularly talk with other plaintiffs’ lawyers.<sup>229</sup>

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221. Interview V, *supra* note 22.

222. Interview IV, *supra* note 56.

223. Interview IX, *supra* note 34.

224. Interview I, *supra* note 41.

225. Interview II, *supra* note 22.

226. Interview XIII, *supra* note 60.

227. Interview XIV, *supra* note 48.

228. Interview V, *supra* note 22; Interview III, *supra* note 24 (explaining that another lawyer described a similar process of arranging meetings with the lawyers and business people on both sides to consider possible resolutions, ideally without filing of lawsuits).

229. Interview IV, *supra* note 56.



The ECA process is designed to promote communication between inside counsel, their clients, and outside counsel, so it is important to put ECAs in writing.<sup>230</sup> Some companies have developed their own ECA forms or “templates” to identify issues that need to be addressed. In one company, ECA is part of a system of reviews in which clients make decisions about whether to file a claim and how to respond to claims against the company. Legal managers expect lawyers to advise clients on a full analysis of the matters.<sup>231</sup> Integrating ECA into case management software would legitimize it so that lawyers recognize that “this is something I need to do.”<sup>232</sup> However, a case management system is not sufficient because the necessary mindset needs to be “in the people” working on the cases.<sup>233</sup> If they do not have that mindset, the system will not be effective.<sup>234</sup>

The assessments must be candid to provide value for decision-makers. Some lawyers worry that they will be “burned” by doing ECAs if they have to write their assessments early in a case and the case does not turn out as expected.<sup>235</sup> So there is a temptation to include “twenty-five caveats,” which makes the assessments less useful for the clients.<sup>236</sup> The corporate culture should reward candor and recognize that assessments necessarily change as the cases unfold and people learn more.<sup>237</sup>

Lawyers and clients must periodically review their case assessments to gain the full benefit from the ECA process.<sup>238</sup> It is important to review cases regularly because litigation evolves over time, parties’ interests shift, and there may be new entrants in litigation.<sup>239</sup> Roger Webster recommends that ECAs be reviewed at least every three to six months.<sup>240</sup> Current PEDR systems vary regarding whether they have a regular schedule for conducting periodic reviews. In one company, there is no directive or schedule to review ECAs, but they are reviewed periodically at “major milestones” in the cases.<sup>241</sup> In another company, riskier cases were reviewed more regularly than less risky cases.<sup>242</sup> Another company reviews all significant U.S. cases every quarter using an internal controllership team as well as external auditors. Asking for reserves for liability is also a natural “toll gate” for review.<sup>243</sup> Outside the U.S., the company regularly reviews all major

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230. Interview IX, *supra* note 34.

231. Interview VII, *supra* note 27.

232. Interview I, *supra* note 41.

233. *Id.*

234. *Id.*

235. Interview IX, *supra* note 34.

236. *Id.*

237. *Id.*

238. Interview I, *supra* note 41.

239. Interview IV, *supra* note 56.

240. Interview IX, *supra* note 34.

241. Interview VII, *supra* note 27.

242. Interview VIII, *supra* note 51.

243. Interview II, *supra* note 22.

litigation but does not have a schedule for updating ECAs due to the variations in the legal systems. For example, in some jurisdictions, cases may evolve quickly while in other jurisdictions, cases may sit in courts or arbitration for years without any material developments.<sup>244</sup>

One company requires outside counsel to conduct ECAs for a flat fee. They have a fixed price “menu” for doing ECAs with the cost varying depending on size of claims, number of documents, fact witnesses, experts, etc.<sup>245</sup> The cost might vary up to 30 percent based on the particular circumstances. The company pays less than a quarter of what it would pay if it were charged on an hourly basis. In the United States, the outside counsel retained by this company do not get paid unless they have done an ECA and check a box in the billing system saying that they have completed it. There is no guarantee that the company will hire the law firm, so this separates completion of an ECA and engagement to handle the matter. Given the sophistication of the company’s lawyers and their legal culture, this system creates a strong incentive for outside law firms to do good assessments. The company uses the ECA to strategize and possibly serve as the basis of a communication to the other side, beginning the negotiation. So the ECA is a key part of the disputing process.<sup>246</sup>

#### *H. Determining Appropriateness of Cases for a PEDR Process*

Lawyers interviewed in this study had different views about what types of cases are appropriate to be handled through a PEDR system. Some lawyers said that almost all cases are suitable for a PEDR process.<sup>247</sup> One said that there is always an opportunity to explore early resolution even if one is not successful in resolving the cases.<sup>248</sup> Along the same lines, another lawyer said that there were some cases where she was less flexible when the other side’s position was not meritorious and she would be patient but persistent.<sup>249</sup>

It is generally appropriate to use a PEDR process when the parties have a continuing relationship.<sup>250</sup> One lawyer said that a “quick way to crater a relationship is not to handle a dispute as a business problem. If you start going to war with someone you have been in bed with, you kill the relationship.”<sup>251</sup> In these cases, he felt that the relationship was more important than the dollars saved.<sup>252</sup> Several lawyers suggested that PEDR gen-

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244. *Id.*

245. *Id.*

246. *Id.*

247. Interview XIII, *supra* note 60; Interview XIV, *supra* note 48.

248. Interview XIII, *supra* note 60.

249. Interview V, *supra* note 22.

250. Interview III, *supra* note 24; Interview IV, *supra* note 56; Interview XII, *supra* note 23; Interview XIV, *supra* note 48.

251. Interview III, *supra* note 24.

252. *Id.*

erally is appropriate in relatively small cases because they do not merit the investment required for litigation as usual.<sup>253</sup> Some lawyers stated that certain categories of cases, like employment cases, may generally be appropriate for PEDR.<sup>254</sup> One lawyer said that if a company has mass claims to settle, a PEDR process is helpful to figure out what they are worth.<sup>255</sup>

Lawyers also suggested categories of cases that are not well-suited for PEDR. For example, PEDR may not be appropriate in cases where there is a reason to vindicate a right, vindicate science, or maintain a reputation even though it would cost more to defend the suit than the amount of the claim.<sup>256</sup> It is not appropriate if a company needs a binding legal precedent, such as in some mass tort cases or cases involving critical intellectual property.<sup>257</sup> In cases with higher stakes, the structure of adjudication in court or arbitration can be helpful.<sup>258</sup> PEDR is not appropriate if there is a clear defense such as statute of limitations or if the other side is making frivolous claims, has no interest in settlement, or has wildly unrealistic expectations.<sup>259</sup> Even if it is not appropriate to try to resolve a case at an early stage, usually it is appropriate to *evaluate* a case promptly to be able to make the best decisions about how to proceed.

Some lawyers worry that plaintiffs (and their lawyers) may interpret the use of a PEDR process as “an invitation for plaintiffs to pick up a settlement check” because the company will “roll over or settle every case.”<sup>260</sup> So companies using a PEDR system should make clear that the process does not guarantee that they will settle and that they are prepared to litigate vigorously when necessary. Indeed, one lawyer developing a PEDR system expects that the amount of the company’s liability to other parties should be similar to those without the PEDR system but the company should reduce its litigation costs. Otherwise, the system would create a “cottage industry to bring cases.”<sup>261</sup> Defendants also may worry that plaintiffs’ counsel may try to take advantage of a process to get access to internal files early in litigation.<sup>262</sup> At the same time, for PEDR systems to be effective, plaintiffs’ counsel must believe that it would be worth their time to explore whether there might be an early resolution that would be in the interest of both parties.<sup>263</sup>

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253. *Id.*; Interview XI, *supra* note 58.

254. Interview IV, *supra* note 56.

255. Interview I, *supra* note 41.

256. Interview VI, *supra* note 90.

257. Interview I, *supra* note 41; Interview V, *supra* note 22; Interview XV, *supra* note 103.

258. Interview XI, *supra* note 58.

259. Interview I, *supra* note 41; Interview III, *supra* note 24; Interview VI, *supra* note 90.

260. Interview VI, *supra* note 90.

261. *Id.*

262. Interview IV, *supra* note 56.

263. Interview VI, *supra* note 90.

### I. Systematically Using Dispute Prevention and Resolution Processes

Companies' preferences for dispute resolution processes varied. Some include a focus on direct negotiation, typically as part of a stepped dispute resolution procedure.<sup>264</sup> Clearly, mediation generally is very popular.<sup>265</sup> Some companies use arbitration,<sup>266</sup> though some lawyers have an aversion to it.<sup>267</sup>

One company developed separate agreements with its major competitors to manage their relationships, including dispute prevention and resolution procedures. Many of the disputes initiated before these agreements were reached were due to misunderstandings and did not need to be as contentious as they were. As part of the agreements, teams from each company currently meet together regularly at their various locations, and they often include meals to promote informality. Relationship teams are chaired by senior executives and include antitrust, regulatory, and global business lawyers. The teams began with representatives from the different companies sitting on opposite sides of the table but now they are interspersed when they meet. The agendas include resolving current disputes, identifying potential disputes, and exploring collaboration. They address potential areas of difficulty before they "fester."<sup>268</sup> When they have conflicts, they are now being discussed primarily in smaller teams, including scientists and business people. They put lawyers in the "back of the room."<sup>269</sup> If the teams cannot reach a resolution, the senior executives try to do so. When the exec-

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264. Interview III, *supra* note 24; Interview V, *supra* note 22; Interview VI, *supra* note 90; Interview XIII, *supra* note 60.

265. Interview I, *supra* note 41 ("It is easy to sell mediation."); Interview II, *supra* note 22 (explaining that mediation helped to reduce the number of pending conflicts by 75 percent over a period when the company became ten times larger); Interview III, *supra* note 24 (explaining that lawyers generally tried negotiation and, if the parties did not resolve the matter, they tried mediation); Interview VI, *supra* note 90 (asserting that once people spend any amount of time in mediation, they become invested in the process and are likely to want to continue); Interview VIII, *supra* note 51 (describing a very successful mediation program for employment disputes); Interview XI, *supra* note 58 (stating that mediation should be a "standard 'go to' process" because it is consistent with corporate objectives of reducing litigation costs while obtaining reasonable settlements); Interview XII, *supra* note 23 (describing that a "key element" of his company's system was early consideration of mediation); Interview XIV, *supra* note 48 (noting the experience of the value of mediation as a business tool). Sometimes, people are dissatisfied with mediation, however. Interview V, *supra* note 22 (stating that many mediators are "terrible" because they do not want to express an opinion on the merits); Interview VII, *supra* note 27 (describing that sometimes parties go to mediation before they understand the strengths and weaknesses of the case and thus they fail to reach agreement); Interview XIV, *supra* note 48 (noting negative reactions to poor process or result attributable to the quality of the mediator or mediation process).

266. Interview VII, *supra* note 27; Interview XI, *supra* note 58; Interview XV, *supra* note 103.

267. Interview III, *supra* note 24; Interview XIII, *supra* note 60 (describing very frustrating experiences with arbitration). A recent survey of corporate counsel in Fortune 1000 companies found a strong general preference for mediation over arbitration. See Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 44-54 (2014).

268. Interview XV, *supra* note 103.

269. *Id.*

utives cannot resolve their differences, they generally use a streamlined arbitration process with limited written discovery. They use a single arbitrator and whenever possible, they submit the matter solely on briefs without a hearing. They use mediation relatively infrequently. Regarding disputes over intellectual property, they have agreed that the party with the primary claim retains the right to file suit first in its chosen jurisdiction, which avoids the race to the courthouse and rapid escalation of the conflict.<sup>270</sup>

Another company is developing a stepped dispute resolution procedure designed to handle a large number of individual plaintiffs in product liability cases. The first step will involve deciding in which cases to use an early resolution process as opposed to traditional litigation procedures. When inside counsel identify cases that might be suitable for the early resolution process, they would contact opposing counsel and internal clients to see if they want to participate and then proceed only if both sides decide to do so. These cases would have limited discovery, so the process would be faster and less expensive than traditional litigation. The initial conversation would be informal negotiation to find out whether the case can be resolved and whether it makes sense to proceed in this process. If there is no resolution after some discussion, the parties might go to a neutral for a recommendation about how to proceed. There might be two options at that point. First, they could proceed with negotiation or mediation and, if they could not agree, they would get a mediator's recommendation and they could "take it or leave it." Second, the neutral might recommend non-binding arbitration with limited witnesses, such as the plaintiff and an expert. Parties could withdraw from the process at any point and use the traditional litigation process. This system is currently in the planning stages and may be revised based on the company's experience with it.<sup>271</sup>

A former general counsel used a two-step process. First, she would try to get the appropriate business executives to negotiate directly. If they did not reach agreement, she would explore mediation.<sup>272</sup>

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270. *Id.*

271. Interview VI, *supra* note 90. Neutrals can provide a range of services in addition to helping to ultimately resolve disputes. See John Lande, *How Neutrals Can Provide Early Case Management of Construction Disputes*, JAMS GLOBAL CONSTRUCTION SOLUTIONS, Spring 2011, at 6, 6–9 (describing how neutrals can provide case management services including supervision of exchange of information, arranging engagement of experts, designing dispute resolution processes, promoting good working relationships, helping lawyers and parties prepare for a dispute resolution process, prompting the drafting of boilerplate language before mediation sessions, and managing the dispute resolution process); see also Paul M. Lurie, *Guided Choice: Early Mediated Settlements and/or Customized Arbitrations*, 7 J. AM. C. CONSTRUCTION L. 167, 167 (2013) (describing "guided choice" process in which a mediator diagnoses disputes and helps design a dispute resolution process, resolve impasses, and plan an arbitration process if needed). These articles refer to construction disputes but the procedures can be used in many types of disputes.

272. Interview XIII, *supra* note 60.

One lawyer believes that a stepped dispute resolution procedure is counterproductive because parties go to mediation before they understand the strengths and weaknesses of the case and thus they fail to reach agreement. He generally likes mediation but only if the timing is right. Most of his matters were negotiated directly and some went to arbitration. So he is comfortable with all the processes but believes that it is better not to link them in a binding stepped procedure.<sup>273</sup>

### *J. Providing Practice Materials and Training*

Providing practice materials and training to a wide range of stakeholders is an important part of a robust PEDR system. This helps to convey the necessary knowledge and skills for the system to function properly and integrate PEDR into the corporation's disputing culture.<sup>274</sup> Since inside counsel generally are the people who conduct PEDR processes, it is particularly important to educate them.<sup>275</sup> A company developing a system to handle product liability claims is developing checklists, procedural protocols, and model documents for exchanging information with plaintiffs. It is developing related documents for plaintiffs to help them use the process.<sup>276</sup> One company developed materials and conducted regular training about arbitration.<sup>277</sup>

PEDR counsel often provide training for other lawyers in their company and serve as a general commercial resource. In one firm, they conducted intensive training sessions designed for commercial lawyers and gave presentations at the company's intellectual property conference.<sup>278</sup> PEDR counsel often provide dispute resolution contract clauses to the companies' commercial lawyers and advise them about using them, as described above.<sup>279</sup> Companies sometimes provide training for outside counsel as well.<sup>280</sup>

It is important to educate internal clients, such as human resources professionals, about dispute resolution in employment matters.<sup>281</sup> In one company, some of the firm's employees as well as outside counsel were trained in skills needed to pursue early resolution opportunities.<sup>282</sup> One lawyer worked with business people in her company to increase their legal and contract knowledge to improve their "conflict management competency" so

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273. Interview VII, *supra* note 27.

274. Interview XI, *supra* note 58; Interview XII, *supra* note 23. For a discussion of the disputing culture in corporations, see Section IV.C *supra* and Section V.H *infra*.

275. Interview I, *supra* note 41; Interview XII, *supra* note 23.

276. Interview IV, *supra* note 56.

277. Interview VII, *supra* note 27.

278. Interview I, *supra* note 41.

279. See *supra* Section IV.E.

280. Interview VIII, *supra* note 51.

281. *Id.*

282. Interview XI, *supra* note 58.

that they could reduce the risk of making misrepresentations and prevent unnecessary conflict.<sup>283</sup> To prevent legal problems, she provided training about a range of issues with legal implications, such as advertising, intellectual property, antitrust, business ethics, and contracts. She trained business people about how to respond to complaints and developed models of letters designed to minimize conflict by being extremely respectful. She also developed template settlement agreements so that managers could settle small matters without involving the legal department.<sup>284</sup>

### *K. Using Alternative Fee Arrangements*

Attorney fee arrangements between companies and their law firms can create incentives to increase the law firms' efficiency and focus on the clients' interests. The traditional hourly fee arrangement creates incentives for law firms to prolong matters rather than resolve them promptly and efficiently. It also reflects a zero-sum perspective in which law firms seek to maximize their fees and clients seek to minimize them.

There has been a trend to use alternative fee arrangements (AFAs) to incentivize prompt resolutions that satisfy the clients' interests and reward law firms for doing so. For example, law firms may charge flat fees for certain tasks, stages of a case, entire matters, or a portfolio of matters. They may receive bonuses for achieving specified objectives or completing the matters quickly. Fees may be adjusted using contingency formulas based on the outcome of the matter.<sup>285</sup> In theory, such AFAs should promote PEDR, and thus companies with PEDR systems should regularly use AFAs. However, these fee arrangements may create problems of their own, and the lawyers in this study had mixed reactions to using them.

One company has used AFAs with good results over time, finding that it takes some effort to create a formula that motivates outside counsel but "does not give away the house."<sup>286</sup> In one case, the company got a good result, but the PEDR counsel felt that the law firm was "spectacularly overcompensated."<sup>287</sup> He was more comfortable with the arrangement afterward, when there was a convergence of interests as part of a "trust-based ecosystem" of an ongoing relationship of confidence and trust.<sup>288</sup> This relationship "runs both ways" so that neither side will let the other get hurt.<sup>289</sup> He said that for the law firm, "this was a party they want to be at."<sup>290</sup>

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283. Interview V, *supra* note 22.

284. *Id.*

285. See LANDE, *supra* note 20, at 39–49.

286. Interview I, *supra* note 41.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

One company has had a long-term arrangement with about a dozen law firms. The company pays a fixed amount per month for the law firms to manage specified matters. If they do a good job, the company increases the workload and compensation. This works well at the “macro level” for the law firms to be efficient, but there are problems at the “micro level” of individual lawyers in the firms.<sup>291</sup> The lawyers still are evaluated within their firms based on the total number of billable hours, even though their hours are not billed to this company. So the lawyers do not have the same incentive to be as efficient as the law firm as a whole. This creates a “tricky” situation because good, ambitious lawyers may resist working on matters for this client.<sup>292</sup> To make this arrangement work at the micro level, the lawyers would have to be evaluated differently for work done for this client or, more generally, to be rewarded for efficiency rather than producing more billable hours.

One company used a bonus system for a few particularly troublesome cases in which the law firms would get larger bonuses for negotiating smaller settlements. Normally, however, the company paid a standard hourly rate. The company negotiated a 10 percent discount below the law firms’ standard rates, though the PEDR counsel assumed that the firm made up for the discount by increasing the number of hours billed.<sup>293</sup>

Another company has a standard arrangement with its law firms to charge fixed rates for performing early case assessments, where the rates for each matter are based primarily on the amount in dispute (as well as other factors). The company has been very satisfied with this arrangement, which provides a lot of control and sets the stage for early negotiation.<sup>294</sup>

Another company has used flat fees, “not to exceed” fees, and success fees, but the PEDR counsel has been uncomfortable with the results because of lower quality of the lawyers’ work product and level of preparation. He now is reluctant to use AFAs, especially because law firms sometimes offer to work for fixed fees when the law firm rejects the company’s proposed hourly rates. The PEDR counsel believes that law firms have software to estimate the fees and try to get the total amount that they could not get on an hourly basis.<sup>295</sup>

Another PEDR counsel tried an AFA once and thought that it did not work well. She preferred to get litigation budgets and vigilantly review bills. She had been a litigator in a law firm, so she had a sense of how long things should take. She was not hesitant about asking questions or firing and replacing counsel. She found that New York law firms were too expen-

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291. Interview IV, *supra* note 56.

292. *Id.*

293. Interview III, *supra* note 24.

294. Interview II, *supra* note 22. For a further description of this arrangement, see the text accompanying notes 240–41 *supra*.

295. Interview VII, *supra* note 27.



sive and litigious. She developed relationships with counsel all over the country and preferred to use them instead. She was pleased with the work of one Midwestern firm, for example, which had an hourly rate of about one third of New York firms and decided that it was worth it to fly them in.<sup>296</sup>

#### *L. Ensuring Survival of PEDR Systems*

Several lawyers noted that the existence and effectiveness of PEDR programs depends on the interest and commitment of the general counsel.<sup>297</sup> When new general counsel are appointed, PEDR systems may be discontinued or de-emphasized if the new general counsel do not value them. A retired general counsel said that his successor had been at the company for many years and “lived the culture” long before he became general counsel, so the transition was “seamless” and the PEDR practices continued.<sup>298</sup> On the other hand, one PEDR counsel noted a change in attitude about the PEDR system in his company that was related to the acquisition of his company. He said that the new management “had their own philosophy and didn’t warm up quite as much” to the PEDR system as before.<sup>299</sup> They did not tell him to stop his PEDR activities, but “they were less willing to buy into” his arguments.<sup>300</sup> He retired soon after the acquisition, and he thinks that the PEDR system does not have a “champion.”<sup>301</sup> They do not take affirmative steps to analyze cases early, and they use mediation only on an ad hoc basis.<sup>302</sup>

One company, which has developed a robust PEDR system involving relationship teams with certain other companies, is “building succession plans for those who will lead the relationship teams.”<sup>303</sup> The PEDR counsel said that they are getting the “logical successors in the room and allowing them to work closely with the current responsible person.”<sup>304</sup> They are making similar arrangements at the CEO level so that new CEOs will meet with their predecessors to learn about the advantages of their system.<sup>305</sup>

These experiences show that survival of PEDR systems is ultimately dependent on the top business leaders because the general counsel serve at their pleasure. Roger Webster said that a PEDR system is more likely to survive if business leaders view it as a tool to satisfy corporate priorities, such as managing the company’s risk and reputation. It is important for the business leaders to be involved, for the systems to be formalized, and for

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296. Interview V, *supra* note 22.

297. See *supra* text accompanying notes 32, 89–93.

298. Interview XIV, *supra* note 48.

299. Interview III, *supra* note 24.

300. *Id.*

301. *Id.*

302. *Id.*

303. Interview XV, *supra* note 103.

304. *Id.*

305. *Id.*

there to be demonstrated benefits, such as cost-savings and risk-reduction. He argues that under these circumstances, the identity of the general counsel does not matter as much. He said that the programs that are most at risk are those that are voluntary and do not require lawyers to put early case assessments in writing. Companies that do not use the best aspects of PEDR systems are less likely to sustain them over time.<sup>306</sup>

## V. RECOMMENDATIONS

This study demonstrates that it is possible for businesses to develop PEDR systems but that it can be hard to do so. While doing so should be a “no-brainer” because PEDR has the potential to satisfy many core corporate interests with little or no risk or added cost, there are predictable barriers that prevent lawyers and business leaders from developing these systems for their companies. Despite these barriers, some companies do use robust PEDR systems, and this study identifies ways that lawyers have helped to develop them. The following steps should help people provide the benefits of PEDR for their companies. Although this study is based primarily on interviews with counsel in large corporations, many of these recommendations can be adapted for small businesses, government agencies, and other organizations by using general dispute system design principles.

### A. *Develop Technical Assistance Resources*

Lawyers and business leaders who want to develop PEDR systems for their companies should not have to “reinvent the wheel.” Lawyers who were interviewed for this study are part of a cohort who have worked through the challenges of developing PEDR systems and are passionate about promoting this innovative approach to other companies. Organizations such as the International Institute for Conflict Prevention and Resolution, the Association of Corporate Counsel, the American Bar Association,<sup>307</sup> the American Arbitration Association, and JAMS can create ongoing committees to assist those who want to develop PEDR systems for their companies. Ideally, these organizations would collaborate with each other in such an effort. Similar working groups could be developed by organizations focusing on particular areas of law, such as construction, employment and labor, energy, financial services, health care, insurance, intellectual property, product liability, and real estate, among others. Such organizations could provide valuable assistance as well as the legitimacy that may provide confidence for business leaders to develop PEDR systems

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306. Interview IX, *supra* note 34.

307. The ABA’s Section of Dispute Resolution has established two time-limited task forces to promote PEDR. Ideally, this Section would partner with other entities, such as the ABA Sections of Business Law and Litigation, to provide ongoing support for businesses and other organizations to develop PEDR systems.

for their companies. Some of the lawyers interviewed for this study have retired. They and other retirees with similar perspectives may especially have the time, expertise, and interest to work with such groups.

These groups could offer direct advice to PEDR system developers about analyzing the situation in their particular companies, including corporate priorities and cultural values relevant to PEDR, potential barriers to adoption of a PEDR system, and methods for identifying and addressing stakeholders' concerns and doubts. In general, corporate stakeholders want to know if a PEDR system will reduce the time and expense of litigation in their companies and be able to measure the benefits. Committees can give advice about methods for producing credible metrics that illustrate the benefits to particular companies and demonstrate how PEDR can add value to their operations. They could help companies tailor an ECA process to fit their particular needs.<sup>308</sup> They could also suggest including information about companies' PEDR systems in their annual reports, including data about positive results that could enhance the companies' market value and be of interest to shareholders.

Technical assistance working groups could also develop persuasive materials highlighting successes of prominent companies as well as generic informational materials about benefits of PEDR systems, developing useful metrics, and addressing doubts about PEDR.<sup>309</sup> They could also conduct trainings so that companies do not have to develop and conduct their own training programs. The working groups could also arrange for the development of general case management software that incorporates PEDR elements, such as prompts to conduct and review early case assessments.

#### *B. Encourage Law Firms and Neutrals to Advise Clients about PEDR*

While technical assistance working groups described in the preceding recommendation could help some companies interested in developing a PEDR system, they cannot help the vast majority of companies. Many organizations might need to get such help from their own outside counsel or neutral dispute resolution professionals.

Providing such assistance could be a great opportunity for lawyers in private firms. This might be counter-intuitive for some lawyers because it would seem to go against their interest in maximizing litigation fees. How-

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308. See *supra* Section IV.G.

309. The Legal Education, ADR and Problem-Solving Task Force of the American Bar Association Section of Dispute Resolution developed a model that might be adapted to address barriers to adoption of PEDR systems. The Task Force promotes integration of instruction in practical problem solving in a wide range of law school courses. The Task Force identified common faculty objections to doing so, causes and underlying interests of the objections, and possible responses. *Overcoming Barriers to Teaching "Practical Problem-Solving"*, A.B.A. SEC. OF DISP. RESOL., <http://leaps.uoregon.edu/content/overcoming-barriers-teaching-%E2%80%9Cpractical-problem-solving%E2%80%9D> (last visited Dec. 19, 2015).

ever, savvy lawyers should recognize that offering this service could be in their enlightened self-interest. This would be a way to deepen relationships with clients and get more business in the long run. That has been Roger Webster's experience, who found that "distinguishing factors like an expertise in early case assessment can make a big difference to the growth of a legal practice."<sup>310</sup> He said that his firm "actively markets our expertise in this area and looks for opportunities to either help [clients] develop a more robust ECA program or apply it to matters we are working on for them. Either way, it promotes our capabilities while demonstrating a value-added proposition, which is hard to measure for clients but seems obvious and real."<sup>311</sup> He has "no doubt" that lawyers will get more business if they help clients set up PEDR systems.<sup>312</sup> He points to his firm's experience of keeping a major client for thirty years because they had a good relationship, based in part by helping with their PEDR system. "They have viewed our firm as adding value in setting up their program and doing early case assessments on their cases."<sup>313</sup>

Although many outside lawyers would not see the benefit or have the interest to advise clients about PEDR, many neutrals would be interested and are well qualified. There is a substantial cohort of mediators and arbitrators who are process experts and have extensive experience handling certain types of cases. Companies might want to hire such neutrals to help them set up a PEDR system.

### *C. Develop a Clear and Flexible Concept of PEDR*

As noted at the outset, there is no generally-accepted definition of planned early dispute resolution. This study suggests that PEDR experts consider several elements to be essential, particularly use of early case assessments and training of relevant personnel. However, this reflects an inference derived from individual interviews rather than the result of a deliberative process by PEDR experts. Clearly, there is no strict uniform model of PEDR considering the particular circumstances of each company.<sup>314</sup> However, it should be possible to identify some general principles and elements of PEDR systems that might be widely accepted as "best practices." Developing such a general consensus could provide additional legitimacy to the process and provide more confidence for lawyers and companies considering whether to adopt PEDR systems.

One lawyer suggested that using a systematic PEDR approach is a matter of basic competence as a business litigator and that it should be a fundamental norm that litigators should systematically handle their cases

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310. Interview IX, *supra* note 34.

311. *Id.*

312. *Id.*

313. *Id.*

314. *See supra* text accompanying notes 68–69.

considering which dispute resolution process is most appropriate.<sup>315</sup> Authoritative bodies might recommend this as a “best practice.”

In addition to the development of general elements of PEDR, it is useful for individual companies to define its meaning in their particular contexts.

#### *D. Use Dispute System Design Methods*

This study demonstrates the challenges in developing PEDR systems. Various stakeholders have differing interests about dispute resolution and so it is important to identify their interests and craft PEDR systems to fit their interests, values, and culture. Dispute system design techniques provide a mechanism for doing so. This involves assembling a team representing key stakeholder groups to design the system, assessing the status quo, planning processes to satisfy stakeholder interests, implementing the system, and periodically evaluating and refining the system to insure its ultimate success. The User Guide of the ABA’s Planned Early Dispute Resolution Task Force provides useful guidance for developing corporate PEDR systems.<sup>316</sup>

It may be particularly helpful to ask stakeholders what they find most troublesome about the way that problems currently are handled in their company. By asking about their frustrations, developers of PEDR systems can focus on the particular problems that their stakeholders are most concerned about as well as their top priority goals.

#### *E. Designate PEDR Counsel to Coordinate PEDR Systems*

Companies that want to optimize their PEDR systems should designate a PEDR counsel to coordinate the system. Without someone who has specific responsibility to oversee the system, it is easy for the necessary activities to be overlooked by busy lawyers with other priorities. The specific responsibilities of PEDR counsel may vary in different companies. These may include some or all of the following: (1) helping plan the system; (2) consulting with experts in the field and in other companies; (3) assembling information about the company’s dispute resolution experience; (4) eliciting views of stakeholders in the company about their interests, objectives, and values; (5) developing recommendations and criteria for early case assessment and determination of optimal resolution processes to accomplish company objectives; (6) developing materials and providing training for stakeholders; (7) providing advice to lawyers and clients about handling particular cases; (8) periodically reporting on the effects of the system; and (9) proposing refinements of the system to make improvements and address any problems.

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315. Interview II, *supra* note 22.

316. See *supra* text accompanying note 72.

*F. Create Appropriate Incentives to Use PEDR*

Companies that want to maximize the benefits of PEDR should incentivize stakeholders to use it appropriately. This requires careful thought to create the proper incentives and prevent unintended consequences. A direct way to motivate inside litigators to use PEDR methods would be to include their performance of PEDR-related tasks in performance reviews and setting compensation. Quantitative metrics, however, may inadvertently encourage inappropriate behaviors. For example, a basic system would involve evaluation of lawyers' early case assessments, which are a central part of PEDR systems. These ECAs are a means to an end and by tying compensation to them, companies might shift the focus from making sound judgments to merely producing these documents.

Basing compensation on the speed of case-handling or reduction in litigation costs is another option. The goal is to promote better decisions and processes to advance the companies' interests. However, broadly-structured incentives may be problematic if they prompt lawyers to be less careful or make inappropriate decisions to settle cases quickly. And it may be hard to fairly implement an incentive system considering the variations in cases. The best approach may involve a general *qualitative* assessment of lawyers' performance including their ability to implement PEDR strategies effectively. Legal departments may wish to give awards or other recognition for inside lawyers who are particularly effective in advancing their companies' goals through the use of their PEDR systems.

Companies have used alternative fee arrangements to incentivize law firms to handle their cases efficiently. For example, when outside counsel conduct ECAs, companies may follow the example of the company described in this study which requires law firms to conduct ECAs for a fixed fee.<sup>317</sup> This arrangement should be feasible for many companies and law firms as they should be able to anticipate the amount of work required with more certainty than in fully litigating a case. Companies retaining outside counsel to conduct these ECAs need not commit in advance to retain the law firms and can decide whether to do so based on the quality of the assessment. If the assessment is not very useful because it includes so many caveats or does not make satisfactory recommendations, the company may decide to retain another law firm. Major companies typically retain law firms repeatedly which can create an incentive for the firms to satisfy the companies' expectations about ECAs. Establishing a routine practice of conducting ECAs should enable companies and their law firms to develop clear expectations about what is needed. This work should be a normal part of handling cases, so it should not add significant workload or cost, assuming that the amount of analysis would be proportional to the amount at stake, the companies' interests, and the amount of uncertainty. With the

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317. See *supra* text accompanying notes 240–41.

benefit of an ECA at the outset of a matter, companies can make good strategic decisions about how to handle a matter and whether it makes sense to pursue early negotiation, mediation, vigorous litigation, or another option.

Other alternative fee arrangements may be beneficial as well, although they can produce unintended consequences, such as lower quality work and inappropriate decisions to settle cases too quickly. The arrangements may also be problematic if they do not create appropriate incentives for individual lawyers within the law firm to produce better procedures and outcomes than through litigation as usual. For example, if lawyers are evaluated based on the total number of billable hours, the incentives for the law firm to be efficient may not be effective or lawyers may avoid working on cases with these fee arrangements. As with incentives for inside counsel, it may be appropriate to make overall qualitative judgments about the law firms' effectiveness in achieving the clients' goal of promoting efficiency, among others.

#### *G. Plan for PEDR to Survive the Departure of Initial Champions*

Innovations like PEDR generally occur because particular individuals are motivated to find a better way to do their work. In the business context, individual litigators may begin to "just do it" and, after achieving some success, enlist the support of champions in the leadership of the legal department and the company as a whole. Sometimes, visionary leaders institute PEDR as part of their management philosophy. Leaders inevitably depart at some point and, if a PEDR system is not firmly established, there is a significant risk that it will be discontinued or atrophy. Thus, a major part of the PEDR project should be planning for succession of its champions so that the successors will appreciate the value in continuing it and, ideally, enriching it.

#### *H. Make PEDR a Valued Part of the Corporate Culture*

For PEDR systems to be most effective, they must become integrated as a valued part of the culture of the legal department and the company generally. Lawyers in this study emphasized that, viewed properly, PEDR is not merely a set of procedures for handling disputes, but rather it should be an intrinsic part of a company's business strategy and culture. It reflects a set of values and norms about how companies and their employees should operate generally, not just when they are in conflicts. With this perspective, business people and lawyers routinely try to solve problems and prevent disputes whenever possible and, when disputes do arise, to handle them smartly and efficiently. Companies deal with problems promptly and forthrightly out of enlightened self-interest. An effective PEDR approach not only promotes fundamental business values, such as increased efficiency,

greater control, reduced risk, and better substantive outcomes, it also contributes to a company's earned reputation as a responsible member of society with which individuals, businesses, and government agencies are proud to do business with.

There is no simple formula for changing a corporate culture.<sup>318</sup> This involves a combination of often subtle things that unfold over time and eventually become taken for granted. Business leaders certainly can promote a particular cultural vision by issuing policy statements and taking actions symbolizing their commitment to that vision. Nonetheless, employees can easily ignore such things if they are not regularly reinforced and if they are inconsistent with their individual values and incentives.

The success of incorporating a PEDR perspective into a corporate culture may depend, in part, on how consistent it is with the existing culture. If business and legal leaders have a warrior's take-no-prisoners mindset, PEDR is less likely to take root. Conversely, if leaders already seek outcomes that PEDR can provide, this cultural project offers greater promise. Most companies are probably somewhere in between these extremes, and so it is likely to take some effort to harmonize PEDR with the existing corporate culture.

Proponents of PEDR systems are most likely to be successful in embedding PEDR into the corporate culture if they adopt most or all of the recommendations in this article and pursue them persistently for an extended period of time. Dispute system design procedures provide a way to do so systematically.<sup>319</sup> One of the key elements of this process is an assessment of the values, interests, and perspectives of the stakeholders. Obviously, business and legal leaders are especially important stakeholders to satisfy. It is also very important to understand and satisfy a wide range of other stakeholders to make this project succeed, especially the front-line lawyers.

### *I. Conduct Additional Research*

This study provides a useful sketch of why and how businesses actually use PEDR. It identifies general perspectives of a range of stakeholders and describes elements used in various PEDR systems. As noted at the outset, it is a small qualitative study that does not explore any of these topics in great depth. Thus the PEDR project would benefit from additional research. One avenue would be to examine some or all of these topics in more depth. For example, it would be useful to interview various stakeholders, both

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318. The subject of how to change a corporate culture is beyond the scope of this article. A Google search yields many articles from reputable business journals with sometimes inconsistent advice, often implying that changing corporate culture is easy if one follows "x" simple steps. In practice, usually it is quite challenging. Proponents of PEDR systems should carefully analyze the theory and practice of changing corporate culture.

319. *See supra* Section V.D.



within and outside corporate legal departments, to learn their perspectives about issues involved in PEDR systems. In particular, it would be very valuable to get a more detailed understanding of how they develop early case assessments and use them in practice.

In addition to interviewing people in companies that already use PEDR systems, it would be helpful to learn the perspectives of individuals in companies that do not use such systems. These interviews could help identify the potential for developing them as well as possible barriers not mentioned in this study. In particular, it would be very helpful to understand what business lawyers and executives experience as common and frustrating problems in their work and how PEDR systems might help alleviate those problems. These interviews should include a wide range of stakeholders in addition to inside counsel. In particular, it would help to learn the perspectives of top business leaders. Although such subjects would not be able to describe detailed operations of dispute resolution processes, they would provide valuable insights about how PEDR systems might or might not fit within their own values and perspectives.

It would also be helpful to measure the frequency that particular populations of businesses use elements of PEDR systems. For example, how many businesses regularly conduct ECAs? What categories of cases are included or excluded from this process? Which stakeholders typically are involved in the ECA process? Who typically takes the lead? Do the businesses have someone designated to fulfill the responsibilities of a PEDR counsel? What are the duties of these individuals? Do the companies' contracts regularly include dispute resolution clauses? What dispute resolution processes are typically used in these clauses? Do these clauses include dispute *prevention* provisions? Under what circumstances do the companies use particular alternative fee arrangements?

People who do not have experience conducting surveys should enlist experienced survey researchers to help plan and conduct surveys because this research method is much harder to conduct than most people imagine. It can be very difficult to get a substantial number of people to respond at all, and those who do respond may not provide very useful or valid data. Writing good survey questions is surprisingly difficult. Methodological challenges abound. On the other hand, novice researchers might consider using semi-structured interviews like the ones used for this study. This research method is especially useful for getting a more complete understanding than is possible with surveys and there are fewer ways to make serious methodological mistakes.<sup>320</sup>

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320. See John Lande, *What Me—A Social Scientist?*, INDISPUTABLY (May 4, 2015), <http://www.indisputably.org/?p=7021>.

## VI. CONCLUSION

PEDR is an important innovation in the handling of business disputes. Considering the great potential benefits of PEDR systems, one might expect that most business leaders would insist on using such systems. However, our study shows that adopting and operating effective PEDR systems is surprisingly challenging. Even so, some legal and business leaders have provided the leadership needed to promote these systems, overcoming various barriers. This study identifies some of these barriers and the ways that business lawyers and executives have confronted and managed them. It provides guidance for others who want to “think different” from the current norm in business disputing. If this project is successful, many more lawyers and clients will think this same way in dealing with business conflicts, sometimes resolving them well before they become disputes.